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SUPREME COURT, U.S.

No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether an entity that is wholly and beneficially owned by a foreign state's instrumentality, and whose sole purpose is to perform international treaty and trade agreement obligations for the benefit of the foreign state's citizens, may nonetheless be denied status as an "organ of a foreign state" under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity's creation, conduct, and operations on behalf of its government.

2. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d).

PARTIES TO THE PROCEEDINGS

Petitioner Powerex Corp. was a cross-defendant/appellant/appellee in the district court and court of appeals proceedings.

The following also were parties to the district court and court of appeals proceedings and are respondents in this Court:

AES Corporation was a defendant

AES Redondo Beach, LLC was a defendant

AES Alamitos, LLC was a defendant

AES Huntington Beach, LLC was a defendant

Arizona Electric Power Cooperative, Inc. was an intervenor/cross-defendant/appellee

Arizona Public Service Company was a cross-defendant/appellee

Automated Power Exchange, Inc. was a cross-defendant/appellee

Avista Energy, Inc. was an intervenor/cross-defendant/appellee

Bonneville Power Administration was a cross-defendant/appellant/appellee

Borrego Water District was a plaintiff

British Columbia Hydro and Power Authority was a cross-defendant/appellee

Cruz M. Bustamante was a plaintiff/appellee

Cabrillo Power I, LLC was a defendant/appellee

Cabrillo Power II, LLC was a defendant/appellee

City and County of San Francisco was a plaintiff

City of Los Angeles Department of Water and Power was a cross-defendant/appellee

City of Oakland was a plaintiff

Commission de Federale Electricidad was a cross-defendant/appellee

Constellation Power Source (now Constellation Energy Commodities Group) was a cross-defendant/appellee

County of Santa Clara was a plaintiff

Mary L. Davis was a plaintiff

Department of Energy was a cross-defendant/appellee

Duke Energy Morro Bay, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Moss Landing, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Oakland, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy South Bay, LLC was a defendant/cross-claimant/appellant/appellee

Duke Energy Trading and Marketing, LLC was a defendant/cross-claimant/appellant/appellee

Dynegy, Inc. was a defendant

Dynegy Marketing and Trade was a defendant

Dynegy Power Marketing, Inc. was a defendant

El Segundo Power, LLC was a defendant/appellee

Fallbrook Public Utility District was a plaintiff

General Public of the State of California was a plaintiff/appellee

Pamela R. Gordon was a plaintiff/appellee

Hafslund Energy Trading LLC was a cross-defendant/appellee

Helix Water District was a plaintiff

Ruth Hendricks was a plaintiff/appellee

IDACORP Energy, L.P. was an intervenor/cross-defendant/appellee

Idaho Power Company was an intervenor/cross-defendant/appellee

Patrick N. Keegan was a plaintiff/appellee

Long Beach Generation, LLC was a defendant/appellee

Barbara Mathews was a plaintiff/appellee

Metropolitan Transit Development Board was a plaintiff

MIECO, Inc. was a cross-defendant/appellee

Mirant Americas Energy Marketing L.P. (fka Southern Company Energy Marketing, L.P.) was a defendant

Mirant California, LLC (fka Southern Energy California, LLC) was a defendant

Mirant Delta, LLC (fka Southern Energy Delta, LLC) was a defendant

Mirant, Inc. (fka Southern Energy, Inc.) was a defendant

Mirant Potrero, LLC (fka Southern Energy Potrero, LLC) was a defendant

Morgan Stanley Capital Group Inc. was a defendant

Nevada Power Company was a cross-defendant/appellee

Northern California Power Agency was an intervenor/cross-defendant/appellee

NRG Energy, Inc. was a defendant/appellee

Oscar's Photo Lab was a plaintiff

PacifiCorp was a cross-defendant/appellee

PacifiCorp Power Marketing Inc. was a cross-defendant/appellee

Padre Dam Municipal Water District was a plaintiff

People of the State of California was a plaintiff/appellee

PG&E Energy Trading Holdings Corporation was a defendant

PG&E Energy Trading-Power, L.P. was a defendant

Pier 23 Restaurant was a plaintiff/appellee

Plant General Electric Company was a cross-defendant

Portland General Electric Company was a cross-defendant/appellee

PP&L Montana, LLC was a cross-defendant/appellee

Public Service Company of New Mexico was a cross-defendant/appellee

Puget Sound Energy, Inc. was an intervenor/cross-defendant/appellee

Ramona Municipal Water District was a plaintiff

Reliant Energy Coolwater, Inc. (fka Reliant Energy Coolwater, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Ellwood, Inc. (fka Reliant Energy Ellwood, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Etiwanda, Inc. (fka Reliant Energy Etiwanda, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Mandalay, Inc. (fka Reliant Energy Mandalay, LLC) was a defendant/cross-claimant/appellant/appellee

Reliant Energy Services, Inc. was a defendant/cross-claimant/appellant/appellee

Reliant Ormond Beach, Inc. (fka Reliant Ormond Beach, LLC) was a defendant/cross-claimant/appellant/appellee

Sacramento Municipal Utility District was an intervenor/cross-defendant/appellee

Salt River Project Agricultural Improvement and Power District was an intervenor/cross-defendant/appellee

San Diego Transit Corporation was a plaintiff

San Diego Trolley, Inc. was a plaintiff

Sempra Energy, Inc. was a defendant/appellee

Sempra Energy Resources was a defendant/appellee

Sempra Energy Trading was a defendant/appellee

Sierra Pacific Industries was an intervenor/cross-defendant/appellee

Sierra Pacific Power Company was a cross-defendant/appellee

Sierra Pacific Resources was a cross-defendant/appellee

Silicon Valley Power (City of Santa Clara) was an intervenor/cross-defendant/appellee

Sunlaw Cogeneration Partners I (now Sunlaw Energy Partners I, L.P.) was a cross-defendant/appellee

Sweetwater Authority was a plaintiff/appellee

Trans Alta Energy Marketing Company was an intervenor/cross-defendant/appellee

Trans Canada Power Company was a cross-defendant

Tucson Electric Power Company was an intervenor/ cross-defendant/appellee

United States of America was a cross-defendant/appellee

Valley Center Municipal Water District was a plaintiff

Vista Irrigation District was a plaintiff

Western Area Power Administration, Colorado River Storage Project, was a cross-defendant/appellee

The Williams Companies, Inc. was a defendant

Williams Energy Marketing & Trading Co. was a defendant

Williams Energy Services Co. was a defendant

Yuima Municipal Water District was a plaintiff

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Powerex Corp. states the following:

Powerex Corp. is a Canadian corporation that is wholly owned by the British Columbia Hydro and Power Authority, which is a Provincial Crown Corporation owned in its entirety by Her Majesty the Queen in right of the Province of British Columbia. No publicly held company owns any Powerex stock.

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INTRODUCTION

More than six decades ago, the United States and Canadian governments began to work together to harness the ravaging powers and potential benefits of the Columbia River system, which traverses both nations and is one of the largest watersheds in North America. Those efforts culminated in 1961 in the Columbia River Treaty, a pact that committed both nations to working together to construct dams, establish reservoirs, develop hydropower-generation capabilities, and coordinate flood-control efforts. Because the United States was to be the principal beneficiary of the dam projects and reservoirs built on the Canadian side of the boundary, the United States agreed to reimburse Canada for decades with half of the electricity generated on the American side. That power created a substantial benefit that Canada ultimately transferred to British Columbia, in exchange for the Province's commitment of public resources to the construction of the necessary water-control facilities.

Blessed with a citizenry willing to devote public tax dollars to fulfilling that joint governmental mission and large quantities of hydropower generated by new facilities on British Columbia rivers, the Province began marketing its hydropower to the United States. In 1988, the Provincial government created Powerex to serve as its "export agency" for marketing Provincial power to United States wholesale purchasers. Since its inception, Powerex has been wholly owned by the Province's statutory agent, BC Hydro (itself wholly owned by the Province), has generated revenues that are consolidated with those of BC Hydro and then transferred to the Province, has operated under Provincial laws that apply only to governmental entities, and has fulfilled international obligations assigned to it by the Province.

In holding that Powerex was not an "organ" of British Columbia under the Foreign Sovereign Immunities Act of 1976, the Ninth Circuit disregarded the wide range of factors that properly denominate Powerex's status, and it

placed great weight on several factors that contradict the Act's text and structure. Its judgment therefore should be reversed.

The Ninth Circuit had appellate jurisdiction, notwithstanding 28 U.S.C. § 1447(d). The district court's remand order did not specify that it was based on a lack of subject-matter jurisdiction, nor could it. It is well settled that, when a federal agency or foreign sovereign removes a case, the court has jurisdiction over the entire case, including claims against defendants that are not federal agencies or federal sovereigns. Accordingly, the district court had discretion to adjudicate or to remand the claims against Powerex. Under this Court's well-settled precedent, the proscription against appeal under § 1447(d) does not apply in this context. Moreover, because of the special dignity and foreign-policy interests associated with determining a foreign sovereign's status, this Court should not construe § 1447(d) as foreclosing the right of appeal when a district court erroneously denies the organ status of a foreign sovereign.

OPINIONS BELOW

The district court's opinion granting the remand motion (Pet. App. 18a-44a) is unreported. The court of appeals' opinion (*id.* at 1a-17a) is reported at 391 F.3d 1011.

JURISDICTION

The court of appeals entered its judgment on December 8, 2004. A petition for rehearing was denied on March 3, 2005. Pet. App. 45a. On May 23, 2005, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including July 1, 2005, *id.* at 215a, and on June 22, 2005, further extended the time for filing to and including July 15, 2005, *id.* at 216a. The petition for a writ of certiorari was filed on July 15, 2005, and was granted on January 19, 2007 (JA 290). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

TREATY & STATUTORY PROVISIONS INVOLVED

Relevant treaty and statutory provisions are set forth in the petition appendix and the addendum to this brief.

STATEMENT OF THE CASE

The Columbia River, BC Hydro, and Powerex

In the mid-1940s, the United States and Canada began a concerted effort jointly to develop the resources of the Columbia River Basin, which spans the Pacific Northwest region of the two nations. That process ultimately led to British Columbia's decision to create Powerex for the purpose of exporting Provincial hydroelectric power. Subsequently, the Province decided to use Powerex to market power received from the United States under the Columbia River Treaty. A proper understanding of Powerex's status as an organ of British Columbia requires a brief history of those developments.

1. The Columbia River begins in British Columbia at the western foot of the Rocky Mountains and travels 1,214 miles before emptying into the Pacific Ocean near Astoria, Oregon. *See* Federal Columbia River Power System, *The Columbia River System Inside Story* 4 (2d ed. 2001) ("*Inside Story*"), *available at* http://www.bpa.gov/power/pg/columbia_river_inside_story.pdf. With its steep descent, numerous tributaries, and favorable climate, the Columbia Basin presents a series of environmental challenges and economic opportunities. The challenges stem from the difficulty of harnessing river waters in flood conditions – in 1894 and 1948, the Columbia Basin experienced severe flooding, sparking calls for construction of multipurpose dam projects to prevent future floods. Such projects also create economic opportunities, through irrigation and hydroelectric power generation. *See* Neil A. Swainson, *Conflict Over the Columbia: The Canadian Background to an Historic Treaty* 27-28, 42 (1979) ("Swainson")[1]; John V. Krutilla, *The Columbia River*

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[1] *See also* Swainson at 42 ("The torrent of waters in that year [1948] breached the dykes on the Kootenay River south of Kootenay Lake in

Treaty: The Economics of an International River Basin Development 15, 19 (1967) ("Krutilla"); *Inside Story* at 34.

Because the Columbia's flows are primarily snow-fed and thus fluctuate drastically between seasons, variations in water runoff create special challenges for hydropower generation. Excess electricity produced during peak flows cannot be easily stored, and periods of low river discharge result in power shortages. The solution to those problems was to build upstream dams and reservoirs, in which large quantities of river water could be stored and released in a controlled manner, promoting the efficient generation of hydroelectric power and reducing flooding. *See Inside Story* at 4-5; Krutilla at 19, 32.

In 1909, the United States and Great Britain (on behalf of Canada) entered into the Boundary Waters Treaty,[2] which was designed to prevent disputes over the use of waters located on or flowing across the United States–Canada border and to establish a mechanism, known as the International Joint Commission ("IJC"), to facilitate further collaboration.[3] After the dam-building boom of the New Deal era, and in light of catastrophic flooding on the Columbia, the United States and Canada opened a dialogue on how to develop the natural resources of the Columbia Basin in a mutually beneficial way. Together, the two nations asked the IJC to analyze the feasibility as well as costs and benefits to each country of further

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Canada and the United States; it inundated part of Trail, B.C.; and, in the United States, it took fifty lives and caused property damage in excess of a hundred million dollars. As might be expected, the disaster evoked a number of plans designed to prevent a recurrence.").

[2] Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada, Jan. 11, 1909, 36 Stat. 2448 ("Boundary Waters Treaty").

[3] *See generally Inside Story* at 5 ("Beginning in 1909, the Columbia River has been harnessed for the benefit of the U.S. Pacific Northwest and the Canadian Pacific Southwest.").

development of the Columbia River.[4] After a lengthy investigation, the IJC published its findings, concluding that there were "possibilities for cooperative development in the Columbia Basin that could be of mutual advantage to the two countries."[5] The IJC also recognized that the United States would benefit more from developing the Columbia's resources for hydroelectric power generation and flood control than would Canada.[6]

That dialogue culminated in 1961, when the United States and Canada signed the Columbia River Treaty.[7] Under the treaty, Canada agreed to build dams and reservoir facilities on the Canadian side of the border to control the flow of the Columbia River. Those dams and reservoirs enabled the United States to generate more hydroelectric power and to reduce flooding on its side of the border. *See* Columbia River Treaty Art. II (Pet. App. 63a-64a); Pet. App. 51a (Peterson Decl.). In return, Canada received a right to one-half of the increased generation capacity that would be realized in the United States. *See id.* Art. V, § 1 (Pet. App. 66a); Pet. App. 51a (Peterson

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[4] *See* Reference from the Canadian and United States Governments to the International Joint Commission (Canadian Note) (Mar. 9, 1944), *reprinted in* The Columbia River Treaty Protocol and Related Documents, Issued by the Canada Departments of External Affairs and Northern Affairs and National Resources at 17 (Queen's Printer, Ottawa, Feb. 1964) ("Columbia River Treaty Protocol and Related Documents"); Keith W. Muckleston, *International Management in the Columbia River System* 25 (UNESCO PCCP, 2003), *available at* http://unesdoc.unesco.org/images/0013/001332/133292e.pdf.

[5] Report of the International Joint Commission on Principles for Determining and Apportioning Benefits From Cooperative Use of Storage of Waters and Electrical Interconnection Within the Columbia River System (Dec. 29, 1959), *reprinted in* Columbia River Treaty Protocol and Related Documents at 39.

[6] *See id.* at 40.

[7] Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, 15 U.S.T. 1555 ("Columbia River Treaty") (Pet. App. 61a-137a).

Decl.). In recommending ratification of the treaty, the Senate Foreign Relations Committee recognized that the treaty would "provide great benefits to the United States and Canada in power, flood control, irrigation and other water uses – far greater benefits than either country could have if it attempted to act alone" – and that the "United States is indeed fortunate to have a neighbor to the north willing and able to cooperate in great constructive enterprises of this kind which tend to draw the two countries ever more closely together." Columbia River Treaty, S. Exec. Rep. No. 2, at 8 (1961).

In the immediate aftermath of the treaty's signing, a few important issues needed to be resolved. The Canadian federal government negotiated with the government of British Columbia over which of the two would bear responsibility for implementing Canada's obligations under the treaty (and receive the resulting benefits). *See* Pet. App. 50a-52a (Peterson Decl.). As negotiations between Canada and British Columbia progressed, the United States and Canada recognized a need to implement the treaty in a manner that reflected the Province's anticipated role. Rather than amending the treaty, Prime Minister Pearson met with President Kennedy at Hyannis Port in May 1963 and announced that negotiations would resume shortly to produce a "protocol" outlining "clarifications and adjustments" in the treaty's terms.[8]

In July 1963, the Canadian and Provincial governments entered into an agreement under which the Province agreed to perform several of Canada's obligations under the treaty and, in return, the Province would receive many of Canada's benefits under the treaty – including the right to one-half of the United States' increased

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[8] Excerpt from Joint Communiqué Issued 11 May 1963 by the Office of the Primer Minister and the Office of the White House Press Secretary Following Meetings Between President John F. Kennedy and Prime Minister Lester B. Pearson at Hyannis Port, Massachusetts, 10-11 May 1963, *reprinted in* Columbia River Treaty Protocol and Related Documents at 99.

hydropower-generation capacity. *See id.* at 51a (Peterson Decl.).[9] In January 1964, the United States and Canada agreed to the treaty protocol, which provided additional detail on the treaty's implementation. *See id.* at 93a-100a. At about the same time, Canada and the United States agreed that the United States would pay Canada a lump sum of money to cover the first 30 years of its obligation to reimburse Canada for increased generation capacity. *See id.* at 52a (Peterson Decl.), 101a-117a, 119a-132a. Canada, in turn, assigned that payment to the Province. *See id.* at 52a (Peterson Decl.).[10]

The Columbia River Treaty required Canada and the United States to appoint "entities" to administer its obligations. *See* Art. XIV, § 1 (Pet. App. 74a). The United States designated Bonneville Power Administration ("BPA") and the Army Corps of Engineers, collectively, as the United States entity responsible for administering the treaty. *See* Pet. App. 55a (Peterson Decl.); *id.* at 133a (Executive Order). Canada designated the British Columbia Hydro and Power Authority ("BC Hydro"), a Provincial Crown Corporation created by British Columbia in 1964. *See id.* at 50a-52a (Peterson Decl.); *id.* at 118a (minutes of Privy Council meeting). BC Hydro (and its predecessor entity) played an important role in negotiations regarding (1) the Protocol to the Columbia River Treaty, (2) the payment by the United States that satisfied the first 30 years of its obligation to compensate Canada for increased generation, and (3) the Canada–British Columbia agreements to implement the treaty. *See id.* at 52a (Peterson Decl.).

On September 16, 1964, President Johnson and Prime Minister Pearson met and formally ratified the Columbia River Treaty and Protocol. *See* Swainson at 1. That event marked the conclusion of a 20-year dialogue – spanning the terms of five United States Presidents and four

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[9] *See* Canada–British Columbia Agreement §§ 2-3 (July 8, 1963).

[10] *See* Canada–British Columbia Agreement (Jan. 13, 1964).

Canadian Prime Ministers – between the United States and Canada as well as Canada and British Columbia. And it allowed the massive construction projects required to implement the agreement to begin.

2. In enacting the British Columbia Hydro and Power Authority Act, which created BC Hydro, the Provincial government's goal was to establish an entity to maximize the Province's hydroelectric production capacity. *See* Pet. App. 7a; *id.* at 50a (Peterson Decl.).[11] BC Hydro has fulfilled that sovereign objective by building dams, developing storage capacity, and operating hydroelectric generating facilities. *See id.* at 50a, 52a. The Province also used BC Hydro to build the facilities required under the Columbia River Treaty, and BC Hydro continues to be responsible for implementation of the treaty. *See id.* at 52a.

As a result of BC Hydro's development activities, the Province's generating capacity for a period of time exceeded the Province's electricity needs. Consequently, BC Hydro became an active seller of power at the border to buyers in the United States, principally BPA. *See id.* at 53a. Those sales furthered the Province's goal of maximizing the benefits of its hydroelectric resources. BC Hydro also distributes electricity to the citizens of British Columbia. *See id.* at 59a.

As a Provincial Crown Corporation, BC Hydro is owned entirely by Her Majesty the Queen in right of the Province of British Columbia, by which name the Province is formally known. *See id.* at 58a. The legislation that created BC Hydro enumerated its powers – including powers not generally available to private companies in British Columbia – and provided specifically that BC Hydro "is for all its purposes an agent of the government and its

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[11] Since its creation in 1964, BC Hydro has been "continued" by statute numerous times. *See* Power Measures Act, S.B.C., ch. 40 (1964); Power Measures Act, S.B.C., ch. 38 (1966); Hydro and Power Authority Act, R.S.B.C., ch. 188 (1979); Hydro and Power Authority Act, R.S.B.C., ch. 212 (1996) ("Hydro Act").

powers may be exercised only as an agent of the government." Hydro Act § 3(1) (Pet. App. 166a). All substantive powers of BC Hydro are subject to, and can only be exercised with, the approval of the Lieutenant Governor in Council or the Provincial Minister responsible for BC Hydro. *See* Pet. App. 59a (Peterson Decl.).[12]

3. In the late 1980s, the Province decided to create a governmental entity to optimize its hydroelectric resources through exports, including the export of surplus hydroelectric power created as a result of BC Hydro's construction projects. *See* Pet. App. 53a (Peterson Decl.). In debates, members of the British Columbia legislative assembly expressed opposition to any subsidization of export activities through BC Hydro's retail utility rates. *See* JA 198-99. The Province's Minister of Energy responded by assuring that the "export opportunity . . . should be . . . separated from the service to British Columbians" and that "[i]n no way" should BC Hydro's retail utility rates include export costs. JA 201. The minister stated that the "export agency . . . will begin its life . . . as a subsidiary of B.C. Hydro." *Id.* He explained that "[t]he reason for creating an agency – a single marketing desk, if I can describe it that way – is . . . to drive a good bargain in the U.S.A. . . . . We sell from strength, in other words." *Id.*

Following the preparation of a Cabinet submission on the issue, the energy minister issued a written directive to BC Hydro, explaining that "Cabinet has decided that we should provide a single window agency to be responsible to market the export of power outside the province and

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[12] "Lieutenant Governor in Council" refers to the Lieutenant Governor of British Columbia acting on and with the advice of the Executive Council or Cabinet of British Columbia. *See* British Columbia Government House website, FAQs, *at* http://www.ltgov.bc.ca/faq. "When the Cabinet makes a decision and it has been approved by the Lieutenant Governor, it is said to have been made by the Lieutenant Governor in Council." *Id.* "The Lieutenant Governor is the representative of Her Majesty The Queen of Canada in the Province of British Columbia." *Id.*, Role, *at* http://www.ltgov.bc.ca/office/role.htm.

that this entity should be a wholly owned subsidiary of B.C. Hydro." JA 267. The minister directed BC Hydro "to incorporate the Export Agency." *Id.* In December 1988, BC Hydro – acting as the Province's agent – incorporated Powerex, which was originally known as the "British Columbia Power Export Corporation," as its wholly owned subsidiary. *See* Pet. App. 53a (Peterson Decl.); JA 230-31 (Peterson Dep.).

From its inception, Powerex has performed functions prescribed by Provincial officials. Initially, Powerex took delivery of British Columbia's surplus electricity and sold it at the border to purchasers in the United States and Alberta. *See* Pet. App. 53a-54a (Peterson Decl.). Subsequently, the Province decided to use Powerex to maximize the benefits of the Columbia River Treaty. As noted, the United States paid a lump sum to cover the first 30 years of its obligation to compensate Canada for increased generation capacity. *See supra* p. 7. Near the end of those 30 years (in the mid-1990s), officials of Powerex participated with BC Hydro in negotiations with the Corps of Engineers and BPA to address how the United States' remaining obligation would be satisfied. *See* Pet. App. 55a (Peterson Decl.). Those parties reached an agreement requiring the United States to satisfy its treaty obligation by providing electricity, a benefit that inured to the Province under agreements between the Province and Canada. The Province and BC Hydro, in turn, transferred their rights, title, and interest in the agreement to Powerex. *See id.*; JA 133-55 (Entitlement Assignment Agreement).

Powerex markets the power received from the United States under the Columbia River Treaty, with the objective of maximizing its value to the Province. *See* Pet. App. 55a (Peterson Decl.).[13] The United States' obligation un-

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[13] *See* Powerex website, Our Resources ("Powerex is responsible for marketing the highly reliable . . . power [received from the United States under the Columbia River Treaty] on behalf of the BC government."), *at* http://www.powerex.com/about/resources.htm.

der the Columbia River Treaty is Powerex's largest single external source of power. JA 250-51 (Peterson Dep.). Powerex pays the Province directly for power it receives from the United States. *See* JA 140 (Entitlement Assignment Agreement); *see also* JA 264 (Peterson Dep.).

In 1997, Powerex received authorization from the Federal Energy Regulatory Commission to sell wholesale electricity in the United States at market-based rates.[14] Powerex has entered into transmission arrangements with United States utilities; it participates in United States wholesale electricity markets; and it acts as both an exporter and an importer of power. Powerex's participation in wholesale electricity markets within the United States allows the Province to maximize the value of its hydroelectric resources by exporting energy when available and, when necessary, importing energy to replenish depleted Provincial reservoirs. *See* Pet. App. 58a (Peterson Decl.); JA 235-37, 238-39 (Peterson Dep.).[15] No other entity imports power for the benefit of BC Hydro.

Powerex also performs Provincial obligations under the United States–Canadian Skagit River Treaty[16] and the British Columbia–Seattle Agreement (Mar. 30, 1984) (JA 160-71). *See* Pet. App. 56a (Peterson Decl.). Under the British Columbia–Seattle Agreement, the provisions of which were confirmed by the Skagit River Treaty, the City of Seattle agreed not to raise the High Ross Dam, which would have had the effect of flooding substantial

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[14] *See British Columbia Power Exch. Corp.*, 80 FERC ¶ 61,343 (1997).

[15] *See also* JA 206 (Report on Export Trade) ("BC Hydro's primary objective is to provide low-cost, reliable electricity supply to domestic customers. Within this context, Powerex's activities are designed to support optimal economic utilization of BC Hydro's electricity assets by using non-committed generation capability to earn income.").

[16] Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, Apr. 2, 1984, T.I.A.S. No. 11088, 1469 U.N.T.S. 309 (Pet. App. 138a-146a).

areas of British Columbia. *See id.* In exchange, British Columbia agreed to deliver substantial quantities of electricity to Seattle through 2066. *See id.* The Province assigned many of its benefits and obligations under that agreement to BC Hydro. *See id.* In the late 1990s, Powerex took the lead in renegotiating transmission arrangements for electricity delivered to Seattle. *See id.* at 56a-57a; JA 172-89 (transmission agreement between BC Hydro and Seattle). BC Hydro subsequently delegated to Powerex operating responsibilities under the resulting transmission agreements, making Powerex responsible for arranging the transmission and delivery of power to Seattle to meet the Province's international obligations under the British Columbia–Seattle Agreement. *See* Pet. App. 57a (Peterson Decl.); JA 259 (Peterson Dep.); JA 190-94 (BC Hydro–Powerex Assignment Agreement). In addition, Powerex entered into an agreement with BPA under which Powerex agreed to pay BPA to deliver electricity to Seattle in the event that transmission difficulties prevented Powerex from supplying power as required. *See* Pet. App. 57a (Peterson Decl.). That Powerex contract further assured that the Province's obligations under the British Columbia–Seattle Agreement would be fulfilled.

As explained in greater detail below (*see infra* Part I.B), Powerex's earnings are consolidated with those of BC Hydro, which annually pays up to 85 percent of its consolidated net income directly to the Province, with the remaining income being reinvested in BC Hydro and Powerex. The Province supervises Powerex in a variety of ways. The Lieutenant Governor in Council (the Executive Council of the Province) directly appoints BC Hydro's board of directors, which, in turn, appoints Powerex's board (and the majority of Powerex's board consists of BC Hydro board members). Powerex is subject to extensive financial regulations that apply only to governmental entities. Further, Powerex's employment-compensation decisions conform to Provincial constraints, and Powerex's

export activity has been a subject of political debate and public concern in the Province.

Powerex enjoys significant benefits under Canadian and British Columbia law. It does not pay Canadian or Provincial income taxes, and its commercial arrangements are frequently supported by BC Hydro guarantees, which permit Powerex to benefit from BC Hydro's credit rating, which is equal to that of the Province. Unlike private businesses, Powerex is eligible to receive financial benefits from the Province, and Powerex's employees participate in BC Hydro's pension plan.

Statutory Framework

1. The Foreign Sovereign Immunities Act of 1976[17] ("the FSIA" or "the Act") governs litigation against "foreign state[s]," including their "agenc[ies]" and "instrumentalit[ies]." 28 U.S.C. § 1603(a); *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989) ("the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country"). The Act affords numerous jurisdictional and procedural protections to foreign states and their agencies and instrumentalities, *see* 28 U.S.C. §§ 1391(f), 1441(d), 1604, 1606, 1608-1609, 1611, including the right to remove suits brought against them in state court to federal court. Under § 1441(d), "[a]ny civil action brought in a State court against a foreign state as defined in [the FSIA] may be removed by the foreign state to [federal] district court," where the case is tried without a jury. *Id.* § 1441(d).

Under the FSIA, a "foreign state" entitled to remove to federal court under § 1441(d) includes any "agency or instrumentality of a foreign state." *Id.* § 1603(a). Section 1603(b) in turn defines an "agency or instrumentality of a foreign state" as any entity that (1) "is a separate legal person, corporate or otherwise"; (2) "is an organ of a foreign state or political subdivision thereof" or "a majority

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[17] Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1441(d), 1602-1611).

of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and (3) "is neither a citizen of a State of the United States" nor "created under the laws of any third country." *Id.* § 1603(b). The issue in this case is whether Powerex is an "organ" of British Columbia, which is a "political subdivision" of Canada, a "foreign state." *Id.* § 1603(b)(2).

2. This Court has ordered the parties also to address the applicability of 28 U.S.C. § 1447(d), which states in relevant part that an "order remanding a case to the State court from which it is removed is not reviewable on appeal or otherwise." Section 1447(d)'s bar of appellate review applies only to cases remanded under § 1447(c), which authorizes remand when, at the time of removal, there is a defect in removal procedure or lack of subject-matter jurisdiction. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995).

Procedural History

1. This appeal arises out of consolidated actions originally filed in California state court by a class of plaintiffs (respondents here) against a number of defendants (also respondents here), including Reliant Energy Services, Inc. and Duke Energy Trading and Marketing, LLC. Reliant and Duke sold power in the California wholesale electricity markets. The proposed plaintiff class comprises retail purchasers of electricity in California. The plaintiffs alleged that the defendants had violated California statutes prohibiting anticompetitive conduct and unfair trade practices by acting in concert to withhold supply, create artificial shortages, and manipulate prices in California's wholesale electricity markets. *See* Pet. App. 7a. The plaintiffs did not name Powerex as a defendant.

Reliant filed a cross-complaint against Powerex, BC Hydro, other alleged market participants, and two federal agencies, BPA and the Western Area Power Administration ("WAPA"). Duke also filed a cross-complaint against

Powerex, BPA, WAPA, and several other entities, but not BC Hydro. Reliant and Duke alleged that, if they were liable, then the cross-defendants were liable as well because the cross-defendants also sold power in California's wholesale electricity markets.

Powerex and BC Hydro removed the action to federal district court as foreign states under 28 U.S.C. § 1441(d). BPA and WAPA also removed the case as federal "officer[s]" or "agenc[ies]" under 28 U.S.C. § 1442(a)(1). BC Hydro further contended that it was immune from suit under the FSIA, *see* 28 U.S.C. § 1604, and the federal agencies similarly asserted that federal sovereign immunity barred claims against them.[18] The plaintiffs moved to remand. *See* Pet. App. 7a-8a.

2. At the outset, the district court made clear that the case was "properly removed" to federal court. Pet. App. 20a. The district court also agreed with BC Hydro, BPA, and WAPA that sovereign immunity barred the claims against them. *See id.* at 21a-33a, 38a-44a.

The court concluded, however, that Powerex was not an agency or instrumentality of a foreign state under the FSIA, 28 U.S.C. § 1603(b). First, the court held that Powerex was not an "organ" of British Columbia, *id.* § 1603(b)(2), because Powerex does not exercise regulatory authority; it is not immune from suit; its directors are not directly appointed by the government and its employees are not civil servants; and (in the court's view) the Province does not exercise sufficient oversight of Powerex. *See* Pet. App. 34a-36a. Second, the court did not accept Powerex's contention that, because the Province owns all of Powerex's shares through BC Hydro, which is the Province's agent by statute, Powerex is an entity "a majority of whose shares or other ownership interest is owned by a"

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[18] Because the allegations in this case arise from a "commercial activity carried on in the United States" by Powerex, 28 U.S.C. § 1605(a)(2), Powerex did not claim immunity from suit under the FSIA.

political subdivision of a foreign state under § 1603(b)(2). The court reasoned that the Province's ownership of Powerex was insufficiently direct to satisfy the statute. *See id.* at 36a-38a.

Having resolved BC Hydro's and the federal agencies' claims of immunity and Powerex's claim of foreign-state status, the district court remanded the entire action to state court, without elaboration. *See id.* at 44a. It did so without first dismissing the claims against BC Hydro, BPA, and WAPA, even though it had held that those entities were immune from suit. Duke, Reliant, and Powerex sought a stay of the remand order, and BC Hydro and the federal agencies sought clarification that the court had in fact dismissed, not remanded, the claims against them. The district court denied those motions. Even though BC Hydro's and the federal agencies' rights to remove the case were undisputed and had been accepted by the court, the court stated that it lacked subject-matter jurisdiction over the entire action and therefore could neither grant a stay nor dismiss any claims. *See* JA 281-89.

3. Reliant, Duke, Powerex, BPA, and WAPA appealed. Powerex contested the holding that it was not an agency or instrumentality of British Columbia. Reliant and Duke challenged the district court's conclusion that BC Hydro and the federal agencies were immune from suit. And BPA and WAPA sought review of the district court's decision to remand, rather than dismiss, the claims against them.

At the outset, the court of appeals rejected the plaintiffs' contention that § 1447(d) precluded appellate review of the district court's remand order. The court noted that "the district court had jurisdiction over this case because BPA, WAPA, and BC Hydro properly removed the case from state court" and that "[s]uch a removal removes the *entire* case." Pet. App. 10a. Recognizing that § 1447(d) applies only to cases remanded for a defect in removal procedure or lack of subject-matter jurisdiction and that neither ground was present here, the Ninth Circuit held

that § 1447(d) did not bar review of the district court's rulings. *See id.*

The court of appeals then dispatched Duke's and Reliant's challenges to the district court's holdings on the immunity of BC Hydro and the federal agencies. *See id.* at 11a-14a. The Ninth Circuit also held that the cross-claims against the immune federal agencies should have been dismissed, and it therefore vacated the portion of the district court's order remanding the claims against those federal entities. *See id.* at 16a-17a.[19]

Turning to Powerex's appeal, the court initially explained that the relevant inquiry under the FSIA's "organ" prong is whether the entity engages in a public activity on behalf of a foreign government. *See id.* at 15a. And the court acknowledged the existence of record evidence that Powerex performs a public function on behalf of British Columbia. *See id.* at 15a-16a. But the court focused on a handful of facts that it viewed as undermining Powerex's claim – namely, that Powerex is "not run by government appointees"; is "not staffed with civil servants"; is (in the court's view) "not wholly owned by the government"; and does "not exercise any regulatory authority." *Id.* The court then explained that evidence of a public purpose did not suffice for organ status because "[Powerex's] high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law[,] *dictate* our holding that Power[e]x is not an organ of British Columbia." *Id.* at 16a (emphasis added).

As to the FSIA's "ownership" prong, the court rejected Powerex's contention that the Province directly owns Powerex through BC Hydro as the Province's statutory agent. The court read this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), as foreclosing that contention because, regardless of any agency relationship,

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[19] BPA and WAPA have subsequently been dismissed from the case.

"unless the foreign government itself actually owns the shares, the entity does not meet the definition of a foreign state." Pet. App. 16a (citing 538 U.S. at 474-76).[20]

SUMMARY OF ARGUMENT

I. Congress passed the FSIA to provide "broad jurisdiction in the Federal courts" over cases involving foreign states and their agencies and instrumentalities. H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604; S. Rep. No. 94-1310, at 12 (1976). Its aim was to mitigate the potential harm that suits against foreign governmental entities could cause to the United States' foreign relations. To that end, the Act permits a foreign entity to remove a suit to federal court when the entity is an "organ" of a foreign state or a foreign state's political subdivision. *See* 28 U.S.C. §§ 1441(d), 1603(a)-(b).

The FSIA's text, structure, and history demonstrate Congress's understanding that an organ entitled to a federal forum under the FSIA would always be separate from the government and would often be engaged in commercial activity. And this Court recognized as much in *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), when it described a "typical government instrumentality" as a "distinct economic enterprise." *Id.* at 624. With the exception of the Ninth Circuit in this case, lower courts have properly recognized that, in deciding whether an entity is an organ of a foreign government, a court should take into account a wide range of factors to determine whether the entity serves a public purpose.

Under the proper, fact-sensitive analysis, Powerex is an organ of British Columbia. The Province created Powerex to export its surplus hydropower. Today, Powerex performs additional public functions. It markets power received from the United States under the Columbia

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[20] On remand in state court, the claims against BC Hydro were dismissed.

River Treaty with the goal of maximizing the value of that public resource to the Province, and it fulfills Provincial responsibilities under international agreements relating to the Skagit River Treaty. Income from Powerex's activities benefits only the public treasury and the customers of the Province's public electricity utility, BC Hydro. Further, Provincial law imposes obligations on and provides benefits to Powerex unlike those incurred or received by private businesses.

In refusing to recognize Powerex's status as an organ of British Columbia, the Ninth Circuit failed to appreciate the significant public activities performed by Powerex. Instead, the court found dispositive several factors that conflict with the FSIA's text and structure, as well as common sense. The Ninth Circuit's misunderstanding of the basic principles of the FSIA's organ-status inquiry undermines the Act's goal of promoting international comity and threatens a bilateral trading relationship involving billions of dollars worth of electricity.

II. The court of appeals correctly concluded that it had appellate jurisdiction, notwithstanding 28 U.S.C. § 1447(d). Section 1447(d) applies only when the order of remand was authorized by § 1447(c). *See Thermtron*, 423 U.S. at 346. Section 1447(c), in turn, authorizes district courts to remand cases when there is a defect either in removal procedure or subject-matter jurisdiction at the time of removal. Here, the district court correctly concluded that the entire action was "properly removed." Pet. App. 20a. Therefore, the remand order could not have been authorized under § 1447(c), and § 1447(d) does not bar appellate review. In any event, Congress did not intend for § 1447(d) to foreclose appellate review of erroneous decisions denying a foreign governmental entity's rights under the FSIA.

ARGUMENT

I. POWEREX IS AN "ORGAN" OF BRITISH COLUMBIA

A. Congress Intended The Term "Organ" To Describe A Wide Variety Of Governmental Entities

In enacting the FSIA, Congress intended "to channel cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). The FSIA provides that "[a]ny civil action brought in a State court against a foreign state as defined in [the FSIA] may be removed by the foreign state to [federal] district court," where the case is tried without a jury. 28 U.S.C. § 1441(d). That "clear authority to remove" is a critical congressional guarantee, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." H.R. Rep. No. 94-1487, at 32; S. Rep. No. 94-1310, at 32 (same). The complementary right to a nonjury trial furthers Congress's desire for uniform adjudication of actions involving foreign states. *See* H.R. Rep. No. 94-1487, at 13 ("Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved."); S. Rep. No. 94-1310, at 12 (same). Congress viewed the "uniformity in decision" provided by federal bench trials as "desirable" because "a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13; S. Rep. No. 94-1310, at 12 (same).

The FSIA defines a "foreign state," which is entitled to remove to federal court under § 1441(d), broadly to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). The phrase "agency or instrumentality of a foreign state" includes any entity that "is an organ of a foreign state or political subdivision thereof." *Id.* § 1603(b). The FSIA does not define the term "organ." But the Act's text and structure demonstrate

that Congress intended that term to describe a variety of commercial entities and governmental corporations, and the federal courts largely have adhered to that intent.

1. The Act's language provides that an agency or instrumentality can be either an organ or an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). Under this Court's decision in *Dole Food*, an entity does not satisfy the latter "ownership" prong unless the foreign state or political subdivision directly owns more than 50 percent of the entity's shares or other ownership interest. *See* 538 U.S. at 477. Thus, for the term "organ" to have meaning, it must describe entities in which the foreign government does *not* directly own a majority of the shares or other ownership interest. That provision offers powerful evidence that Congress intended the term "organ" to encompass a wide variety of foreign governmental entities with varying ownership structures.

The FSIA's structure also makes clear that an entity's commercial character does not count against the entity in assessing organ status. The Act codified "the restrictive theory of sovereign immunity," under which foreign sovereigns are not immune from suits arising from their commercial acts. *See Verlinden*, 461 U.S. at 487-88; 28 U.S.C. § 1605(a)(2). But the Act's commercial-activity exception applies only to claims of immunity.[21] The FSIA grants entities that satisfy § 1603(a)'s broad definition of a "foreign state" other jurisdictional and procedural protections – including the right to a bench trial in federal court – regardless of whether the suit arises from a commercial activity. *See* 28 U.S.C. §§ 1391(f), 1441(d), 1606, 1608-1609, 1611; *Dole Food*, 538 U.S. at 484 (Breyer, J., concurring in

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[21] *See* 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state").

part and dissenting in part). That structure demonstrates that Congress intended foreign governmental corporations to be considered organs of foreign states regardless of their commercial character. And the House and Senate reports confirm that conclusion, explaining that a "variety" of commercial entities could qualify for the Act's protections, such as "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, [or] an export association." H.R. Rep. No. 94-1487, at 15-16; S. Rep. No. 94-1310, at 15 (same).[22]

Further, "organ" was not the only term in the FSIA that Congress left for judicial elaboration. The FSIA defines a "commercial activity" – the practice of which can defeat a foreign entity's claim of immunity – only by "reference to the nature of the course of conduct or particular transaction or act" that is alleged to constitute commercial activity. 28 U.S.C. § 1603(d). That inexact standard reflects the view that "[i]t has seemed unwise to attempt an excessively precise definition of [the phrase "commercial activity"], even if that were practicable." H.R. Rep. No. 94-1487, at 16; S. Rep. No. 94-1310, at 16 (same). Instead, Congress decided to grant the courts "a great deal of latitude in determining what is a 'commercial activity.'" H.R. Rep. No. 94-1487, at 16; S. Rep. No. 94-1310, at 16 (same). The omission of a precise definition of the term "organ" thus similarly indicates Congress's intent that courts take a flexible approach in evaluating whether an entity is a foreign government's organ.

2. In accordance with the FSIA's text and structure, lower federal courts (other than the court below) have

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[22] Moreover, the legislative history shows that Congress understood that those types of entities generally would not be afforded immunity – although they would receive the other benefits of their governmental status. *See* H.R. Rep. No. 94-1487, at 16 (commercial activity "includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation"); S. Rep. No. 94-1310, at 15 (same).

interpreted the term "organ" with reference to a wide range of factors.[23] In general, courts have considered the touchstone of organ status to be whether the entity

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[23] *See Board of Regents v. Nippon Tel. & Tel. Corp.*, No. 05-51432, 2007 WL 273957, at *4 (5th Cir. Feb. 1, 2007); *Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, Nos. 05-6886-CV(L) & 06-0624-CV(XAP), 2007 WL 241294, at *2-*3 (2d Cir. Jan. 30, 2007); *Filler v. Hanvitt Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004); *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 209 (3d Cir. 2003); *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003); *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001); *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff'd in part, dismissed in part*, 538 U.S. 468 (2003); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000); *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1084 (9th Cir. 1999), *withdrawn by* 237 F.3d 1007 (9th Cir. 2001); *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996); *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460-61 (9th Cir. 1995); *S&S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 414-15 (2d Cir. 1983); *Murphy v. Korea Asset Mgmt. Corp.*, 421 F. Supp. 2d 627, 639-46 (S.D.N.Y. 2005), *aff'd*, 190 F. App'x 43 (2d Cir. 2006), *petition for cert. pending*, No. 06-728 (U.S. filed Nov. 22, 2006); *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 552-53 (S.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 790-91 (S.D.N.Y. 2005); *RSM Prod. Corp. v. Petroleos de Venezuela Societa Anonima*, 338 F. Supp. 2d 1208, 1215 (D. Colo. 2004); *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003), *vacated in part on other grounds*, Nos. 01 Civ. 9510 *et al.*, 2003 WL 21729978 (S.D.N.Y. July 25, 2003), *aff'd*, 378 F.3d 213 (2d Cir.), *cert. denied*, 543 U.S. 1022 (2004); *Jeong v. Onada Cement Co.*, No. CV 99-11092 GHK, 2000 WL 33954824, at *8-*10 (C.D. Cal. May 17, 2000); *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 Civ. 6124(JGK), 1999 WL 307666, at *5 (S.D.N.Y. May 17, 1999), *aff'd*, 199 F.3d 94 (2d Cir. 1999); *Glencore, Ltd. v. Chase Manhattan Bank, N.A.*, No. 92 Civ. 6214(JFK), 1998 WL 74294, at *3 (S.D.N.Y. Feb. 20, 1998); *Southern Ocean Seafood Co. v. Holt Cargo Sys., Inc.*, No. Civ. A. 96-5217, 1997 WL 539763, at *4-*5 (E.D. Pa. Aug. 11, 1997); *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997); *Intercontinental Dictionary Series v. de Gruyter*, 822 F. Supp. 662, 672-73 (C.D. Cal. 1993); *Sudano v. Federal Airports Corp.*, 699 F. Supp. 824, 826 n.3 (D. Haw. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852-54 (S.D.N.Y. 1978); *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977).

engages in activity serving "a national interest" or "public purpose" and does so on behalf of a foreign government. *E.g.*, *USX*, 345 F.3d at 209. In applying that standard, courts typically examine multiple complementary factors, including the manner of the entity's creation, its purpose, government supervision of the entity, government financial support, the entity's employment practices, and the entity's obligations and privileges under the foreign law. *See id.* at 206, 209; *see also Filler*, 378 F.3d at 217; *Kelly*, 213 F.3d at 846-47. Mindful, however, that Congress intended a flexible approach to organ status, courts do "*not* apply [those considerations] mechanically or require that all . . . support an organ-determination." *Kelly*, 213 F.3d at 847; *accord USX*, 345 F.3d at 207, 209 (noting "congressional goals of promoting uniformity of decision and avoiding impairing foreign relations," and concluding that "no one [factor] is determinative").

The factors that lower courts have considered in applying the FSIA's organ prong comport with the "common features" of a "typical government instrumentality" identified by this Court in *Bancec*, 462 U.S. at 624. There, the Court explained that a "typical government instrumentality" – "if one can be said to exist" – often exhibits the following features: it "is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law"; it "is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued"; "[e]xcept for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances"; "[t]he instrumentality is run as a distinct economic enterprise"; and "often it is not subject to the same budgetary and personnel requirements with which government agencies must comply." *Id.* Although the Court was not interpreting the FSIA, its description of a "typical government instrumentality" is instructive for interpreting the FSIA, in which the contours

of a foreign government instrumentality are also the subject of inquiry.

B. Powerex Performs Public Activities On Behalf Of The Province Of British Columbia And Canada

When applying the FSIA's organ prong, courts should consider all relevant evidence in determining whether the foreign entity performs public activities on behalf of the foreign government. Under that approach, Powerex unquestionably is an organ of British Columbia.[24]

1. The circumstances of Powerex's creation, which the Ninth Circuit completely ignored, demonstrate Powerex's governmental origin. The Provincial government directed its statutory agent, BC Hydro (a Crown Corporation), to create Powerex as the corporation's wholly owned subsidiary. The Province's purpose in ordering the creation of Powerex was to establish an exclusive export agency to market Provincial hydropower in a way that maximizes the benefits to British Columbia. *See supra* pp. 9-10.[25]

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[24] While "[i]t is not customary for this Court to review the sufficiency of the evidence," it will do so when, as here, "the issue is properly before [it] and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993) (collecting cases). In FSIA cases, this Court has applied the law to the facts of the case when the issue was properly before the Court. *See Dole Food*, 538 U.S. at 474-77 (evaluating whether the Dead Sea Companies "were . . . instrumentalities of Israel under the FSIA at any time"); *Saudi Arabia v. Nelson*, 507 U.S. 349, 356-63 (1993) (evaluating whether the underlying FSIA action was "based on" a commercial activity); *Amerada Hess*, 488 U.S. at 439-43 (evaluating "whether any of the exceptions enumerated in the [FSIA] apply here").

[25] Although British Columbia did not create Powerex through "an enabling statute," as this Court suggested in *Bancec* was "typical," the *Bancec* Court recognized that the features it listed would not be found in every government instrumentality, for it noted uncertainty about whether a "typical" government instrumentality "can be said to exist." 462 U.S. at 624.

2. Powerex's public purposes have expanded. Since 1997, Powerex has participated in wholesale electricity markets within the United States, thereby increasing its ability to purchase power for use in the Province. Further, the Province has entrusted Powerex to market a significant public resource – Canada's right to receive power from the United States under the Columbia River Treaty. And Powerex has participated in negotiating international agreements and performed international obligations for the benefit of British Columbia under the British Columbia–Seattle Agreement and the Skagit River Treaty.[26] *See supra* pp. 10-12.

In addition to those public responsibilities, in the early 1990s, the Province instructed Powerex to explore prospects for creating an efficient Provincial market for energy trading. *See* Pet. App. 54a (Peterson Decl.). In 1997, British Columbia enacted legislation empowering the Provincial government to promote job creation by requiring Powerex (as a subsidiary of BC Hydro) to provide subsidized energy to domestic businesses. *See* Power for Jobs Development Act, S.B.C., ch. 51, §§ 2-3, 6 (1997) (Pet. App. 193a-195a); Pet. App. 55a-56a (Peterson Decl.).

3. Critically, Powerex's revenue does not result in *any* private profit because neither BC Hydro nor Powerex has any private shareholders. Only the Province (and BC Hydro's domestic electricity customers) ultimately benefit from any income generated by Powerex's operations. Under a formula set by Provincial law, BC Hydro annually pays directly to the Province up to 85 percent of its consolidated net income (which includes all of Powerex's income). *See* JA 215 (Lambert Decl.).[27] In addition, the

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[26] *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-19 (1936) (negotiating treaties is a "necessary concomitant[] of nationality").

[27] *See* Hydro Act § 35 (authorizing the Lieutenant Governor in Council to direct BC Hydro to pay amounts to the Provincial government) (Pet. App. 187a); Heritage Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order in Council No. 1125

British Columbia Utilities Commission is required to consider Powerex's projected income in setting BC Hydro's utility rates. *See* JA 215 (Lambert Decl.), 238 (Peterson Dep.).[28] Thus, Powerex's activities result in more affordable electricity for the citizens of British Columbia.

Powerex's earnings are consolidated with those of BC Hydro for purposes of BC Hydro's statutorily required financial statements. *See* JA 215 (Lambert Decl.), 238 (Peterson Dep.); *BC Hydro's Annual Report 2006*, at 83, *available at* http://www.bchydro.com/rx_files/info/info

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(Nov. 27, 2003) (Add. 66). Special Directive No. 4 to the British Columbia Hydro and Power Authority, Order in Council No. 494 (Mar. 30, 2000), which was in effect at the time of removal in this case, was repealed by Order in Council No. 1125 on November 27, 2003. The same Order made effective Heritage Special Directive No. HC1. Special Directive No. 4 required BC Hydro to make an annual payment to the Province according to a specified formula. *See* Special Directive No. 4 §§ 3-8 (Pet. App. 203a-204a). Similarly, Heritage Special Directive No. HC1 provides that the consolidated net income of BC Hydro and its subsidiaries (such as Powerex) are used to determine BC Hydro's "distributable surplus," up to 85 percent of which must be "pa[id] to the government, for deposit into the consolidated revenue fund." §§ 1, 3 (Add. 65, 66).

[28] *See* Heritage Special Direction No. HC2 to the British Columbia Utilities Commission, Order in Council No. 1123, §§ 1, 6 (Nov. 27, 2003) (Add. 53-54, 56). Special Direction No. 8 to the British Columbia Utilities Commission, B.C. Reg. 71/98, amended by B.C. Regs. 72/98, 73/98, and 119/2000, §§ 3-5 (*see* Pet. App. 205a-214a), which was in effect at the time of removal, was repealed by Order in Council No. 1107 on November 27, 2003. It was replaced by Heritage Special Direction No. HC2, which was made effective by Order in Council No. 1123 on the same date. Like Special Direction No. 8, Heritage Special Direction No. HC2 provides that, when the Commission sets BC Hydro's rates, it must allow BC Hydro "an annual rate of return on equity calculated using forecast consolidated operating income" that is, in turn, "calculated on the basis" of Powerex's anticipated net income. §§ 1, 6 (Add. 54, 56). *See generally* JA 206 (Report on Export Trade) ("Since consolidated net income is used for rate setting purposes, the optimization of [Powerex's] electricity trade income benefits domestic ratepayers by reducing the portion of [BC Hydro's] revenue requirement that must be collected through domestic rates.").

46749.pdf.[29] When the two company's financial statements are consolidated, revenues and expenses attributable to transactions between the two firms are eliminated. *See* JA 220 (Lambert Dep.); *BC Hydro's Annual Report 2006*, at 83. Further, under the British Columbia Budget Transparency and Accountability Act, S.B.C., ch. 23 (2000) ("BTAA"), BC Hydro's consolidated financial information is reflected in Provincial budget documents. *See* BTAA §§ 1, 5-6, 9-10 (Add. 13-21).[30]

4. The Province supervises Powerex's operations in a variety of ways. *First*, Provincially appointed BC Hydro directors control Powerex's board of directors. The Lieutenant Governor in Council appoints BC Hydro's board of

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[29] The British Columbia Financial Information Act and accompanying regulation specify detailed information that BC Hydro must periodically prepare and make available to the Province and the public. *See* Financial Information Act, R.S.B.C., ch. 140 (1996); Financial Information Regulation, B.C. Reg. 371/93, § 1 (1993) (Add. 28-29). That Act applies to corporations "the borrowings of which may be guaranteed by the government[] under the authority of" several listed statutes, including the Hydro Act. Financial Information Act § 1 (Add. 27). Under the Financial Information Regulation, the financial statements must be prepared "on a consolidated basis where a parent and subsidiary corporate relationship exists." Financial Information Regulation, Sched. 1, § 1(3)(a) (Add. 28). *See, e.g.*, BC Hydro, *Financial Information Act Return* (2006), *available at* http://www.bchydro.com/rx_files/policies/policies48313.pdf.

[30] *See also, e.g.*, British Columbia Ministry of Finance, *Budget and Fiscal Plan 2006/07 – 2008/09*, at 31-33, 35-36 (Feb. 21, 2006), *available at* http://www.bcbudget.gov.bc.ca/2006/bfp/BudgetandFiscalPlan_06.pdf. The Budget Transparency and Accountability Act applies to "government organization[s]," which means "a corporation or other organization that is within the government reporting entity." BTAA § 1 (Add. 13). The phrase "government reporting entity" includes "government corporations." *Id.* (Add. 14). The Act does not define "government corporation[]," but it states in § 1(2) that, "to the extent that this Act or regulations under this Act do not otherwise define a word or expression used in this Act, the definitions in the *Financial Administration Act* apply." *Id.* § 1.2 (Add. 15). Thus, because Powerex is a "government corporation" under the FAA, *see infra* note 31, it is a "government organization" for purposes of the Budget Transparency and Accountability Act.

directors. *See* Pet. App. 58a-59a (Peterson Decl.). BC Hydro's board, in turn, appoints Powerex's board of directors. *See id.* A majority of Powerex's board is composed of Provincially appointed BC Hydro directors, and the BC Hydro board advises the British Columbia Premier's Office of the identity of outside directors in advance of appointing them. *See id.*; JA 233-35 (Peterson Dep.); *see also* JA 248 (Peterson Dep.) (noting that the Premier's Office had disapproved a potential Powerex outside director).

At the time of removal in this case, the same person chaired the boards of both Powerex and BC Hydro; another individual served as Chief Financial Officer of both Powerex and BC Hydro; and the corporate secretary and assistant secretary were the same for both entities. *See* JA 226 (Lambert Dep.), 233, 234, 235 (Peterson Dep.). In addition, BC Hydro acts as Powerex's treasurer and payroll agent, *see* Pet. App. 59a (Peterson Decl.); JA 214 (Lambert Decl.), 230 (Peterson Dep.), and the communications and government-relations functions are centralized for the two firms. *See* JA 235 (Peterson Dep.).

Second, the record reflects the control of Powerex's financial exposure by a risk-management committee composed of officers of BC Hydro and Powerex that reports periodically to British Columbia's Ministry of Finance. *See* Pet. App. 28a; *id.* at 59a (Peterson Decl.); JA 219-20 (Lambert Dep.), 240-41 (Peterson Dep.); *see also* JA 212-13 (Report on Export Trade). Limiting Powerex's financial exposure is important to the Province because Powerex's trading activity can have political repercussions. For example, Powerex's former Chief Executive Officer testified that the problems Powerex has encountered in obtaining payment for power sold in California during 2000 and 2001 created "a political firestorm . . . in British Columbia." JA 232 (Peterson Dep.). California officials had "importuned" officials of Powerex and BC Hydro to provide the State with electricity, and (with the Province's approval) Powerex fulfilled those requests, even though

there was an energy shortage in British Columbia at the time. JA 232-33, 243-45 (Peterson Dep.). As a result, Powerex's CEO explained, "Provincial government representatives, because this was a popular story in the press, were continually questioned by their constituents as to why an agency of the Crown [*i.e.*, Powerex] was continuing to sell power into California." JA 233 (Peterson Dep.).

Third, unlike private corporations, Powerex is subject to extensive regulation and oversight of numerous aspects of its financial operations. Powerex is a "government body" subject to British Columbia's Financial Administration Act, R.S.B.C., ch. 138 (1996) ("FAA"), which is the Provincial government's fundamental statutory tool of fiscal control.[31] Under the FAA, the Provincial Treasury Board can regulate Powerex's capital expenditures; the Provincial Comptroller General can review Powerex's financial and accounting operations; and the Provincial government can regulate the terms, conditions, and circumstances under which Powerex can enter banking arrangements, lend money, provide financial guarantees or indemnities, borrow money, and acquire property. *See* FAA §§ 4.1, 8(2)(c)(i), 75 (Add. 34-35, 36, 40-41). The FAA also precludes government bodies like Powerex from transacting in commodity derivatives unless authorized to do so by the Provincial Treasury Board. *See id.* § 79.3 (Add. 42). (The Treasury Board has specifically authorized Powerex to engage in those transactions. *See* Commodity Derivatives by Government Bodies Regulation, B.C. Reg.

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[31] The FAA applies to a "government body," a "government corporation," and a "public body." FAA § 1 (Add. 31, 33). The Act defines a "government body" as, among other things, a "government corporation," and it defines both a "government corporation" and a "public body" as, among other things, a corporation in which the government owns "directly or indirectly" more than 50 percent of the shares. *Id.* Because BC Hydro, which is wholly owned by the Province, owns all the shares of Powerex as an agent of the Province, British Columbia owns Powerex "directly or indirectly," and Powerex is therefore a "government body," a "government corporation," and a "public body" under the FAA.

407/2000 (Add. 43).) Further, the Budget Transparency and Accountability Act imposes additional financial-disclosure obligations on Powerex. *See* BTAA §§ 13, 16, 20 (Add. 21-26). Powerex also conforms to Provincial constraints on employee compensation – preventing it from paying salaries equal to those paid by private energy companies. *See* JA 241-42 (Peterson Dep.). And, because Powerex is defined as a "government corporation" under the FAA, *see supra* note 31, its employees are "public office holders" under the Lobbyists Registration Act, S.B.C., ch. 42, § 1 (2001) (Add. 50).

5. Powerex also receives significant benefits under Canadian and Provincial law. As a wholly owned subsidiary of a Crown Corporation, Powerex – unlike private corporations – does not pay Canadian federal or Provincial income tax. *See* Pet. App. 58a (Peterson Decl.).[32] Powerex also receives financial guarantees from BC Hydro to facilitate its export trade, and the Province approves those guarantees. *See id.* at 59a; JA 215 (Lambert Decl.), 223-25, 228 (Lambert Dep.), 239-40 (Peterson Dep.). BC Hydro borrowings and other fiscal arrangements are provided through, and therefore supported by, the Provincial government, resulting in BC Hydro having the same credit rating as the Province. *See* Pet. App. 59a (Peterson Decl.); JA 215 (Lambert Decl.). Powerex does not have its own credit rating. *See* JA 240 (Peterson Dep.).

In addition, under the FAA, Provincial officials can make loans to Powerex on behalf of the government and

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[32] The Canadian Constitution Act of 1867 provides that "[n]o lands or property belonging to Canada or any Province shall be liable to Taxation." Constitution Act, 1867 (The British North America Act), 30 & 31 Vict., ch. 3 (U.K.), *reprinted in* R.S.C., No. 5, § 125 (App. II 1985) (Pet. App. 162a). Accordingly, the Canadian Income Tax Act exempts from taxation wholly owned subsidiaries of Crown Corporations, such as Powerex. *See* Income Tax Act, R.S.C., ch. 1 (5th Supp.), § 149(1)(d), (d.2) (1985) (Add. 45). Similarly, the British Columbia Income Tax Act exempts from taxation entities exempt under § 149(1) of the Canadian Income Tax Act. *See* Income Tax Act, R.S.B.C., ch. 215, § 27 (1996) (Add. 47).

assume Powerex's debt obligations. *See* FAA §§ 53, 56.3(1) (Add. 39-40). The FAA also provides that Powerex is eligible for governmental insurance and risk-management services. *See id.* § 30 (Add. 37). Further, under the Land Act, the Lieutenant Governor in Council can reserve land owned by the government for Powerex's use. *See* R.S.B.C., ch. 245, § 15(2)-(3) (1996) (Add. 48).[33] Finally, Powerex's employees participate in BC Hydro's retirement plan. *See* JA 247-48 (Peterson Dep.).

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In sum, each of the factors that courts typically consider (*see supra* p. 24) supports the conclusion that Powerex is an organ under the FSIA: Powerex was created at the Province's direction to serve a public purpose; it continues to perform public functions; the Province supervises Powerex like a governmental entity (including its employment practices); the Province provides Powerex financial support independently and through BC Hydro; and Powerex enjoys special privileges, such as immunity from taxation. Thus, as the federal government of Canada and the Province of British Columbia have attested in briefs in this Court, Powerex is an organ of British Columbia.[34]

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[33] Section 15(1) of the Land Act benefits "government bod[ies]," Add. 48, the definition of which references a portion of the FAA's definition of government corporations that applies to Powerex. *See supra* note 31.

[34] Brief of the Province of British Columbia as *Amicus Curiae* in Support of Petitioner at 6 (filed Aug. 17, 2005); Brief of the Government of Canada as *Amicus Curiae* in Support of Petitioner at 3, 11 (filed Aug. 17, 2005). Under pre-FSIA law, courts gave great weight to a foreign government's views of the sovereign status of one of its governmental corporations or instrumentalities. *See Restatement (Second) of Foreign Relations Law of the United States* § 66 reporters' note 2 (1965) ("[G]reat weight must be given to the fact that the foreign state considers [a] corporation to be performing the functions of a governmental agency."). Courts should continue to give significant weight to the foreign government's understanding of the relationship between itself and a corporation that it created, particularly where, as here, the

C. The Ninth Circuit's Narrow Interpretation Of The Term "Organ" Is Erroneous

Instead of applying the flexible, fact-sensitive approach to the organ-status question that prevails in the Second, Third, and Fifth Circuits, the Ninth Circuit undertook a mechanical and circumscribed inquiry. In failing to consider all relevant factors, the court of appeals deviated from Congress's intent to afford the FSIA's protections to a wide variety of governmental entities. In addition, the court of appeals relied heavily on several circumstances that cannot be reconciled with the logic and structure of the FSIA.

1. As an initial matter, the Ninth Circuit erred fundamentally in disregarding evidence that Powerex fulfills a public purpose on behalf of the Province. The court recognized that "Power[e]x serves a public purpose in maximizing the value of the Province's surplus hydropower." Pet. App. 15a. But the court dismissed that fact and instead held that Powerex's supposed "high degree of independence from the government of British Columbia," "lack of financial support from the government," and "lack of special privileges or obligations under Canadian law *dictate* [the] holding that Power[e]x is not an organ of British Columbia." *Id.* at 16a (emphasis added). Thus, in addition to ignoring dispositive evidence of public purpose, the court below failed to consider critical factors such as the circumstances of Powerex's creation, the numerous Provincial laws that regulate Powerex as a governmental entity, and the extraordinary benefits Powerex enjoys – such as immunity from taxation.

2. Further, the characteristics selected by the Ninth Circuit as dispositive are contrary to the FSIA's structure and logic. The Ninth Circuit relied heavily on Powerex's lack of immunity from suit under its domestic law. *See* Pet. App. 15a-16a. But any FSIA agency or instrumental-

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corporation is not claiming immunity. *See S&S Mach.*, 706 F.2d at 415.

ity must be "a separate legal person, corporate or otherwise," 28 U.S.C. § 1603(b)(1) – a phrase "intended to include a corporation . . . which, under the law of the foreign state where it was created, *can sue or be sued in its own name*, contract in its own name or hold property in its own name." H.R. Rep. No. 94-1487, at 15 (emphasis added); S. Rep. No. 94-1310, at 14 (same); *cf. Bancec*, 462 U.S. at 624-25 (government instrumentality "is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued"). Thus, Congress expected that an organ generally would be amenable to suit in its home country. Although a foreign government's decision to confer immunity from suit on an entity may be highly probative of that entity's organ status, lack of immunity under domestic law should be afforded little or no weight.[35]

The Ninth Circuit's undue focus on Powerex's supposedly high degree of independence from the Provincial government, *see* Pet. App. 16a, is similarly flawed because it ignores Congress's decision that any entity eligible to be an organ would be a "separate legal person" and thus have some significant level of independence from the government that created it. 28 U.S.C. § 1603(b)(1); *cf. Bancec*, 462 U.S. at 624 (the "distinctive features" of government instrumentalities permit them "a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies"). Moreover, the Ninth Circuit's reliance on the fact that Powerex's employees are not "civil servants," Pet. App. 15a, disregards this Court's recognition in *Bancec* that the government instrumentalities "often [are] not subject to the same . . . personnel requirements with which government agencies must comply." 462 U.S. at 624. In any event, the Ninth Circuit ignored the record evidence

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[35] A foreign entity's lack of immunity under its own law should carry even less weight in a case such as this one, where the foreign entity does not contend that it deserves immunity under United States law.

showing that Provincial political constraints affect Powerex's risk-management and compensation practices. *See supra* pp. 29-31.

The Ninth Circuit also misconstrued the Act in opining that Powerex should be denied organ status because it is "an independent commercial enterprise pursuing its own profits" and (allegedly) lacks financial support from the government. Pet. App. 15a-16a. Congress intended the phrase "agency or instrumentality of a foreign state" to include governmental corporations, regardless of whether those corporations perform commercial activities (and therefore cannot claim immunity from suit). *See* H.R. Rep. No. 94-1487, at 16 (including "a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, [and] a steel company" as examples of agencies or instrumentalities); S. Rep. No. 94-1310, at 15 (same). It is thus illogical to refuse to recognize the governmental status of a corporation simply because it generates sufficient revenue to sustain its operations without government subsidization. That is particularly true of Powerex, which derives significant revenue from marketing power received from the United States under the Columbia River Treaty – a pact that is the quintessence of a sovereign's functions. Indeed, as this Court recognized in *Bancec*, the typical government instrumentality "is primarily responsible for its own finances" and "is run as a distinct economic enterprise." 462 U.S. at 624.

The relevant fact, which the Ninth Circuit ignored, is who ultimately benefits from the entity's earnings. Here, the undisputed evidence shows that the Province and its citizens – not private shareholders – receive all of the benefits of Powerex's activities. In any event, the Ninth Circuit failed to recognize that British Columbia provides financial support to Powerex through, among other things, BC Hydro financial guarantees. *See supra* p. 31.

Finally, the Court below went astray in emphasizing that Powerex's shares are held by BC Hydro – rather than

the Province itself. *See* Pet. App. 15a-16a. Indirect or tiered ownership should be irrelevant to the organ-status inquiry because the FSIA's organ prong is relevant only when the foreign government does not directly own a majority of the entity's shares or other ownership interest. *See supra* p. 21; *Dole Food*, 538 U.S. at 477. It would be illogical, therefore, to count one strike against a foreign entity in applying the organ prong simply because the entity is not "directly" owned by the foreign government.[36]

D. Broad Interpretation Of The Foreign Sovereign Immunities Act's Protections Is Critically Important To United States Foreign Relations

1. Adopting the Ninth Circuit's parsimonious construction of the FSIA would have deleterious consequences for United States foreign relations and foreign trade. The Ninth Circuit's narrow interpretation of the FSIA's organ prong undoubtedly will result in more corporations created by foreign governments being forced to litigate in state court before juries and elected judges. That result conflicts with Congress's intent to provide "broad jurisdiction in the Federal courts," H.R. Rep. No. 94-1487, at 13, thereby assuring "uniformity in the treatment of foreign sovereigns and [removing] any local bias that might be present at a jury trial in a state court," *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000).[37] Relegating foreign governmental entities to state court risks exactly the "adverse foreign relations consequences"

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[36] In any event, British Columbia *does* directly own all of Powerex's shares, through its statutory agent, BC Hydro. *See supra* p. 10. The FSIA's ownership prong is thus satisfied in this case. The petition sought review of the Ninth Circuit's erroneous conclusion on the ownership issue, but this Court granted the petition limited to the organ issue.

[37] The possibility of local bias is no idle concern. In this case, for example, the federal judges of the Southern District of California recused themselves, necessitating the appointment of Judge Whaley from the Eastern District of Washington. *See* JA 93-95. The judges of the California Superior Court took no similar action, however.

that Congress sought to prevent in passing the Act. H.R. Rep. No. 94-1487, at 13; *see Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945) ("judicial action exercising or relinquishing jurisdiction over the [property] of a foreign government . . . may be regarded as . . . an affront to [that government's] dignity"). In addition, the possibility of being deprived of a uniform national forum for resolving disputes presents a serious deterrent to foreign governments' investment and participation in United States markets.[38]

The volume of commerce that could be adversely affected by affirming the decision below is staggering. For example, this case involves Canada, the United States' largest trading partner. The two nations "share one of the world's largest and most comprehensive trading relationships, which supports millions of jobs in each country."[39] In 2005, that bilateral trading relationship was worth $709.5 billion, with more than $1.9 billion worth of goods and services crossing the border daily.[40]

Further, Canada is the largest electricity supplier to the United States.[41] And the bulk of Canadian electricity exports are made by Provincial Crown Corporations (such as BC Hydro) or their marketing subsidiaries (such as Powerex). From 2000 through 2005, Powerex exported energy to the United States worth more than $5.5 billion

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[38] *See* Brief of the Province of British Columbia as *Amicus Curiae* in Support of Petitioner at 3 (filed Aug. 17, 2005) (Decision below "is a wholly unacceptable derogation of the respect sovereigns owe one another as well as an intolerable impediment to ordering the Province's commercial affairs. The increased vulnerability to state court litigation will have a chilling effect on the normally healthy cross-border trade relations between Canada and the United States.").

[39] Canadian Embassy, *The Canada-U.S. trade and investment partnership, available at* http://www.dfait-maeci.gc.ca/can-am/washington/trade_and_investment/trade_partnership-en.asp.

[40] *See id.*

[41] *See* Canadian Embassy, Electricity, *at* http://geo.international.gc.ca/can-am/main/right_nav/electricity-en.asp.

Canadian.[42] During those same years, four subsidiaries of other Canadian Crown Corporations exported to the United States energy worth approximately $9.5 billion Canadian.[43] Prospectively, Canada estimates future development of enough hydroelectricity to satisfy an additional six percent of United States demand.[44] Thus, an adverse ruling in this case would create a significant disincentive to subsidiaries of Canadian Crown Corporations to sell their electricity in circumstances that might subject them to suit in state courts.

2. Reversing the Ninth Circuit's decision is also critically important to avoid disrupting the growth of cross-border trade in North America under NAFTA.[45] NAFTA Article 1102(1) makes clear that the U.S. must guarantee Powerex "treatment no less favorable than it accords, in like circumstances," to domestic investors. NAFTA Art. 1102(1), 32 I.L.M. at 639 (Pet. App. 147a). This "broad

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[42] Canadian National Energy Board, Annual Report 2005 to Parliament at Appendix E6: Electricity Exports 2005 (Mar. 20, 2006); Canadian National Energy Board, Annual Report 2004 to Parliament at Appendix E6: Electricity Exports 2004 (Mar. 22, 2005); Canadian National Energy Board, Annual Report 2003 to Parliament at Appendix E6: Electricity Exports 2003 (Mar. 14, 2004); Canadian National Energy Board, Annual Report 2002 to Parliament at Appendix E6: Electricity Exports 2002 (Mar. 14, 2003); Canadian National Energy Board, Annual Report 2001 to Parliament at Appendix E6: Electricity Exports 2001 (Mar. 15, 2002); Canadian National Energy Board, Annual Report 2000 to Parliament at Appendix E6: Electricity Exports 2000 (Mar. 17, 2001). Those annual reports are available at http://www.neb-one.gc.ca/Publications/index_e.htm#AnnualReports.

[43] *See* the sources cited in note 42, *supra*. Those four Canadian sovereign corporations were Hydro-Quebec, Manitoba Hydro-Electric Board, New Brunswick Power Corp., and Ontario Power Generation.

[44] *See* Canadian Embassy, Electricity, *at* http://geo.international.gc.ca/can-am/main/right nav/electricity-en.asp.

[45] North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, done Dec. 17, 1992, 32 I.L.M. 289 ("NAFTA").

requirement" establishes that there "shall be no discrimination by a Party as between domestic and foreign investors." Daniel Q. Posin, *The Multi-Faceted Investment Arbitration Rules of NAFTA*, 13 World Arb. & Mediation Rep. 13, 13-14 (2002). By treating other comparable and functionally similar United States wholesale power suppliers such as BPA and WAPA as sovereign entities while denying Powerex's status as a foreign sovereign – even though BPA and Powerex alike perform governmental duties under the Columbia River Treaty – the decision below gives an unfair national benefit to a United States entity in discrimination against a Canadian entity.

Moreover, the Ninth Circuit applied a different standard for organ immunity in this case than it previously applied in a case involving a Mexican entity. *See Corporacion Mexicana*, 89 F.3d at 654-55 (applying a fact-sensitive approach in holding that a subsidiary of Mexico's government-owned petroleum monopoly is an organ of Mexico under the FSIA). The Ninth Circuit's decision thus failed to "accord to investors of [the Province] treatment no less favorable than that it accords, in like circumstances, to investors of any other" NAFTA member nation (such as Mexico). NAFTA Art. 1103(1), 32 I.L.M. at 639 (Pet. App. 148a). This Court should reverse that disparate treatment by recognizing Powerex's status as an organ of British Columbia under the FSIA.

II. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S REMAND ORDER

The court of appeals had jurisdiction to review the district court's remand order because 28 U.S.C. § 1291 granted jurisdiction and, for two independent reasons, § 1447(d) did not take it away. First, § 1447(d) bars only review of remand orders authorized under § 1447(c), and the district court's remand order was not authorized under that provision. Second, § 1447(d) does not apply to cases removed under the FSIA.

A. The Remand Order Is An Appealable Order Under 28 U.S.C. § 1291

1. The court of appeals had appellate jurisdiction under § 1291 because the district court's remand order was a final decision. As this Court has explained, "[w]hen a district court remands a case to a state court, the district court disassociates itself from the case entirely, retaining nothing of the matter on the federal court's docket." *Quackenbush*, 517 U.S. at 714. A remand order thus "puts the litigants in [the] case 'effectively out of court,'" *id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11 n.11 (1983)), and "amounts to a dismissal of the suit," *Moses H. Cone*, 460 U.S. at 10. Accordingly, this Court held in *Quackenbush* that a remand order generally constitutes an appealable "final decision" within the meaning of § 1291. 517 U.S. at 713-14.

2. Independently, the district court's remand order is appealable under the collateral-order doctrine. *See Osborn v. Haley*, No. 05-593, slip op. at 10 (U.S. Jan. 22, 2007); *Quackenbush*, 517 U.S. at 713-14. The collateral-order doctrine permits appellate review when a district court's order "conclusively decided a contested issue, the issue decided is important and separate from the merits of the action, and the District Court's disposition would be effectively unreviewable later in the litigation." *Osborn*, slip op. at 10. Each of those criteria is met here. *First*, the remand order "conclusively determine[d] an issue that is separate from the merits" – namely, the right of four sovereign entities to litigate in federal court. *Quackenbush*, 517 U.S. at 714. *Second*, this issue is exceedingly important, as Congress recognized when it enacted § 1441(d) and § 1442(a): sovereigns – both foreign and federal – should not be subjected to state-court jurisdiction against their will.[46] *Third*, because the remand order

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[46] *See supra* p. 20 (discussing the importance of a federal forum in cases involving foreign governments); S. Rep. No. 104-366, at 30-31 (1996) ("A Federal forum in [federal agency] cases is important since state court actions against Federal agencies and officers often involve

here "will not be subsumed in any other appealable order entered by the District Court," *Quackenbush*, 517 U.S. at 714, it is effectively unreviewable "later in the litigation" and is therefore a reviewable collateral order for purposes of § 1291. *Osborn*, slip op. at 10.

B. Section 1447(d) Does Not Preclude Appellate Review In This Case

Section 1447(d) provides in relevant part that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). But § 1447(d) "is not dispositive of the reviewability of remand orders in and of itself." *Thermtron*, 423 U.S. at 345. Rather, it must be read *in pari materia* with § 1447(c), *see, e.g.*, *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006), meaning that the question whether § 1447(d) bars review of a particular remand order depends on whether the "remand order[] [was] issued under § 1447(c) and invok[ed] the grounds specified therein," *Thermtron*, 423 U.S. at 346; *accord Osborn*, slip op. at 12; *Quackenbush*, 517 U.S. at 711-12; *Things Remembered*, 516 U.S. at 127-28.

The remand order in this case was not authorized under § 1447(c). Section 1447(c) authorizes remand only when there is "a defect in removal procedure or lack of subject matter jurisdiction." *Kircher*, 126 S. Ct. at 2153. Neither deficiency occurred here.

1. The district court recognized that "the actions were properly removed in the first instance." Pet. App. 20a. As an agency or instrumentality of a foreign state, BC Hydro was statutorily entitled to remove the entire action (not just the claims against it) to federal court under the FSIA,

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complex Federal issues and Federal-State conflicts."), *reprinted in* 1996 U.S.C.C.A.N. 4202; *Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (the federal-officer removal statute reflects a congressional policy that "federal officers, and indeed the Federal Government itself, require the protection of a federal forum").

28 U.S.C. § 1441(d).[47] Independently, the federal-officer removal statute, 28 U.S.C. § 1442, authorized BPA and WAPA to remove the entire suit to federal court.[48] The district court decided that this case should be remanded only after concluding that those three defendants (BC Hydro, BPA, and WAPA) were immune from suit and that Powerex was not an agency or instrumentality of British Columbia under the FSIA. *See* Pet. App. 20a-44a.

Section 1447(c) did not authorize the district court's remand order because that provision allows remand for a defect in subject-matter jurisdiction only when that defect exists at the time of removal.[49] The structure of § 1447(c) demonstrates that the dispositive question for jurisdictional remands is whether subject-matter jurisdiction existed when the notice of removal was filed. The statute explains *what* gives rise to remand orders – jurisdictional and non-jurisdictional "defect[s]." 28 U.S.C. § 1447(c). It also explains *when* a party may bring such "defect[s]" to the district court's attention – "any time before final judgment" for jurisdictional defects, and within 30 days of removal for non-jurisdictional defects. *Id.* Although the statute is silent on whether a jurisdictional "defect"

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[47] *See* Pet. App. 10a (citing *Nolan v. Boeing Co.*, 919 F.2d 1058, 1064 (5th Cir. 1990)); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3729.1, at 239-41 (3d ed. 1998) ("Wright & Miller") (§ 1441(d) "permits the removal of the entirety of any state court action at the discretion of the foreign state") (citing cases); H.R. Rep. No. 94-1487, at 32 (FSIA "permits the removal of any . . . action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the States in which the action has been brought").

[48] *See, e.g., Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998) ("[I]t is settled that the filing of a petition for removal [under § 1442] by a single federal officer removes the entire case to the federal court.") (internal quotation marks omitted); *see also* 14C Wright & Miller § 3727, at 166-68, 171.

[49] Neither the district court nor any party has identified any defect in removal procedure.

requiring remand must be present at the time of removal or may arise thereafter, § 1447(c) must be construed in light of the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought'" or removed. *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (quoting *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (Marshall, C.J.)); *accord Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004); *Dole Food*, 538 U.S. at 478; *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938). Therefore, the proper reading of § 1447(c) is that Congress intended to authorize a remand based on a defect in subject-matter jurisdiction only when the defect existed at the time of removal.

The history of § 1447(c) confirms that reading of the statute.[50] Before Congress amended § 1447(c) in 1988, that provision authorized a remand to state court "[i]f at any time before final judgment it appears that the case *was removed* improvidently and without jurisdiction." 28 U.S.C. § 1447(c) (1982) (emphasis added). That language plainly directed the district court to consider only defects that existed when the case was removed.[51] In 1988, Congress amended § 1447(c)'s remand provision, but only to clarify that defects in removal procedure are waived if not

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[50] *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62 (2004) ("[t]he statutory history resolves any ambiguity"); *accord id.* at 66-67 (Kennedy, J., concurring); *id.* at 68 (Thomas, J., concurring); *see also Zedner v. United States*, 126 S. Ct. 1976, 1985 (2006) (concluding that the Court's interpretation "is entirely in accord with the Act's legislative history").

[51] *See, e.g., Price v. PSA, Inc.*, 829 F.2d 871, 873 (9th Cir. 1987) (examining jurisdiction "[a]t the time of removal"); *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 645 (5th Cir. 1978) ("the district court should resolve issues relating to its jurisdiction based only on the facts of the case as they existed at the time of removal and should ignore any subsequent developments in the case").

raised within 30 days of removal.[52] That amendment's aim was to preclude parties from belatedly raising defects in removal procedure for strategic reasons.[53]

As amended, § 1447(c) requires motions to remand for non-jurisdictional defects to be filed "within 30 days after the filing of the notice of removal," 28 U.S.C. § 1447(c), whereas jurisdictional defects, as before, may be identified "at any time before final judgment," *id.*; *accord* 28 U.S.C. § 1447(c) (1982). Although Congress thereby altered the time in which non-jurisdictional defects must be identified, nothing suggests that it intended to change the time at which a defect must be present for a remand to be authorized. Thus, § 1447(c) continues to authorize a jurisdictional remand only when the district court lacks subject-matter jurisdiction at the time of removal – as every court of appeals (but one) to have addressed the question has held.[54] *See Nigh*, 543 U.S. at 63-64 (explain-

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[52] *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4642, 4670 (1988). Congress amended the statute again in 1996 to clarify that waivable objections to removal include "any defect other than lack of subject matter jurisdiction." Act of Oct. 1, 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022, 3022.

[53] *See* H.R. Rep. No. 100-889, at 72 (1988) (noting the "risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn"), *reprinted in* 1988 U.S.C.C.A.N. 5982.

[54] *See, e.g., Reddam v. KPMG LLP*, 457 F.3d 1054, 1058 (9th Cir. 2006) ("Where the remand order is not based on defective removal or lack of subject matter jurisdiction at the time of removal, § 1447(c) does not apply and the § 1447(d) restriction does not apply either.") (footnote omitted); *Letherer v. Alger Group LLC*, 328 F.3d 262, 265 (6th Cir. 2003); *Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-91 (11th Cir. 2000); *Transit Cas. Co. v. Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-09 (7th Cir. 1992); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1488 (10th Cir. 1991). *But see Linton v. Airbus Indus.*, 30 F.3d 592, 599-600 (5th Cir. 1994) ("[J]urisdictional remands premised on post-removal events are not reviewable."). *Linton* so ruled in light of "the statutory policy of avoiding substantial delays caused by appellate review," *id.* at 600, but failed to address

ing that the Court will not hold that Congress changed a statute's meaning when "[t]he text does not dictate this result; the statutory history suggests otherwise; and there is scant indication Congress meant to change the well-established meaning [when it amended the statute]"); *see also Keene*, 508 U.S. at 209. Accordingly, the district court had jurisdiction at the time of removal (as it recognized), its remand order was not authorized under § 1447(c), and § 1447(d) does not bar appellate review.[55]

2. Even if this Court were to conclude that § 1447(c) authorizes remand orders for jurisdictional defects that arise after proper removal, the district court in this case never lacked subject-matter jurisdiction and thus could not have remanded the case under § 1447(c). Specifically, the district court did not lose jurisdiction after it resolved the federal issues presented by BC Hydro's, BPA's, and WAPA's defenses of sovereign immunity. Even if (as the district court believed) Powerex was not entitled to a federal forum under the FSIA, the district court had jurisdiction over the claims against Powerex. The FSIA and federal-officer removal statutes create "a species of statutorily mandated ancillary subject matter jurisdiction" over claims against non-sovereign parties. 14C Wright & Miller § 3727, at 171.[56] Once the district court disposed of

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either the structure and history of § 1447(c) or the longstanding principle that jurisdiction is determined at the time of removal.

[55] *See Thermtron*, 423 U.S. at 345-46 (reviewing and reversing an unauthorized remand order); *Quackenbush*, 517 U.S. at 712-13 (discretionary abstention-based remand order reviewable on appeal); 14C Wright & Miller § 3740, at 534-36 (noting that courts of appeals have interpreted *Thermtron* to permit review of remand orders where the district court had discretion to hear or to remand the claims).

[56] *See District of Columbia v. MSPB*, 762 F.2d 129, 132-33 (D.C. Cir. 1985) (per curiam) ("If the federal party is eliminated from the suit after removal under [§ 1442], the district court does not lose its ancillary or pendent-party jurisdiction over the state law claims against the remaining non-federal parties."); 14C Wright & Miller § 3727, at 166-68, 171 (federal-officer removal); *id.* § 3729.1, at 239-43 (FSIA removal). Independently, 28 U.S.C. § 1367 granted the district court

the claims against the sovereign parties, the district court had discretion to "decline jurisdiction over the ancillary claims" and remand those claims to state court. *Id.*[57] Discretionary remand orders are not based on a "lack of subject matter jurisdiction" under § 1447(c), *see Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355 n.11 (1988), and § 1447(d) therefore does not bar appellate review.

3. Nothing in the district court's orders provides a basis for this Court to conclude that § 1447(d) bars appellate review here. This is not a case in which the applicability of § 1447(d) can be determined by looking at "the [district] court's own label" to determine the basis for the remand, *Kircher*, 126 S. Ct. at 2153, because there is no clear label to be found. In its remand order, the district court never explicitly stated that it was remanding the case under § 1447(c) or for lack of subject-matter jurisdiction. *See* Pet. App. 44a. Thus, even if it were the rule under § 1447(d) that the Court may look no further than what the district court "*purported*" to do, *Kircher*, 126 S. Ct. at 2158 (Scalia, J., concurring in part and in the judgment) (citing *Thermtron*, 423 U.S. at 343), it would be appropriate for an appellate court to determine for itself whether the district court in this case remanded on a

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"supplemental jurisdiction" over the claims against Powerex because those claims were part of the same case or controversy as the claims against BC Hydro – claims over which the district court had original jurisdiction under 28 U.S.C. § 1330. *See In re Air Crash Disaster*, 96 F.3d 932, 943 (7th Cir. 1996).

[57] *See MSPB*, 762 F.2d at 133 (when the federal officer is eliminated from the case, "the district court retains the power either to adjudicate the underlying state law claims or to remand the case to state court"); 14C Wright & Miller § 3727, at 171 ("[T]he district court can exercise its discretion and decline jurisdiction over the ancillary claims once the federal agency has dropped out of the case."); *id.* § 3729.1, at 242-43 (when case is removed by a foreign state under § 1441(d), district court has discretion to remand claims against other defendants); *see also* 28 U.S.C. § 1367 (authorizing district courts to decline to exercise supplemental jurisdiction); *Osborn*, slip op. at 17 (district courts have discretion to remand state-law claims after resolution of federal questions).

ground authorized by § 1447(c) because the district court did not explain the basis for its order. *Compare id.* (quoting district court's order remanding "[b]ecause the Court lacks subject matter jurisdiction") *with* Pet. App. 44a ("Accordingly, IT IS HEREBY ORDERED Plaintiffs' Motion to Remand and Motion to Strike and/or Sever Cross-Complaints (Ct. Rec. 58) is GRANTED.").[58]

In any event, this Court's decision in *Kircher* shows that an appellate court may consider whether the district court's remand order was based on a ground authorized by § 1447(c). There, unlike here, the district court explicitly remanded for lack of jurisdiction. *See* 126 S. Ct. at 2153 ("[t]he District Court said that it was remanding for lack of jurisdiction"); *id.* at 2158 (Scalia, J., concurring in part and in the judgment) (quoting district court's remand order). The court of appeals reviewed the district court's remand order after concluding that the order was based on "law that was not jurisdictional at all." *Id.* at 2154. This Court reviewed the legal question before the district court and concluded that it "must be seen as posing a jurisdictional issue." *Id.* at 2155. Although this Court thus disagreed with the court of appeals' determination of whether the district court's remand order was based on the resolution of a jurisdictional question, the Court did not hold that the Seventh Circuit should have stopped simply because the district court labeled its decision as jurisdictional.

Thus, *Kircher* shows that a court of appeals can, consistent with § 1447(d), determine whether the district court's remand order rested on the resolution of a jurisdictional issue. Here, the district court faced the discretionary question whether to remand claims within its ancillary or supplemental jurisdiction – a question to which § 1447(c)

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[58] That conclusion is not affected by the fact that, in orders issued after the remand order, the district court claimed that it remanded under § 1447(c). *See* JA 283, 288. Nothing in this Court's cases suggests that a district court's after-the-fact re-characterization of its remand order should control the scope of appellate review.

"do[es] not apply." *Cohill*, 484 U.S. at 355 n.11. Because the district court's remand order was not based on the resolution (correct or incorrect) of a § 1447(c) issue, § 1447(d) does not bar review. *See Thermtron*, 423 U.S. at 346.

C. Section 1447(d) Does Not Apply To Suits Removed Under The Foreign Sovereign Immunities Act

In any event, § 1447(d) does not bar appellate review here for an additional and independent reason: Congress could not have intended § 1447(d) to confer on a single federal district judge unreviewable authority to deny a foreign sovereign its right under the FSIA to a bench trial in federal court and to relegate that sovereign, instead, to a jury trial in state court. When Congress enacted the FSIA, it created a comprehensive regulatory regime that governs litigation against foreign sovereigns in the United States.[59] In return for conferring upon plaintiffs tools for suing foreign sovereigns, Congress made two guarantees to foreign sovereigns: (1) they will never have to go before a jury, and (2) they will never be subjected to state-court jurisdiction against their will. *See Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 878 (2d Cir. 1981) (Friendly, J.). Congress provided those rights to promote international comity by ensuring that all cases involving foreign sovereigns and their agencies and instrumentalities would be decided in a uniform manner by neutral decision-makers. *See supra* p. 20.

If § 1447(d) were applied to orders remanding cases removed under the FSIA, it would preclude foreign entities from obtaining appellate review of orders relegating them

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[59] *See Verlinden*, 461 U.S. at 488 (the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities"); H.R. Rep. No. 94-1487, at 6 (Congress enacted the FSIA "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity").

to state court and subjecting them to jury trials – orders that risk exactly the "adverse foreign relations consequences" that Congress feared. H.R. Rep. No. 94-1487, at 13. As this Court held in *Osborn*, when a statute conflicts with § 1447(d), "only one can prevail." Slip op. at 16; *see also Thermtron*, 423 U.S. at 345-52. Here, § 1447(d) must yield because Congress could not have intended to grant district judges irrevocable authority to decide questions with such sensitive foreign-relations implications. Indeed, considering that Congress chose to preclude appellate review only of orders remanding for defects in removal procedure or lack of subject-matter jurisdiction, "[i]t is inconceivable . . . that Congress intended that a party be entitled to review of a district court's order remanding a case to the state courts on the ground that its own docket is overcrowded," *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 846 (3d Cir. 1991), but be unable to challenge the court's determination that it is not an organ of a foreign state.

Moreover, applying § 1447(d) here would not further the policies of that provision. In § 1447(d), Congress intended to prevent protracted litigation over nothing more than the forum in which the suit would be heard. *See Kircher*, 126 S. Ct. at 2152 ("The policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed'") (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)); *accord Thermtron*, 423 U.S. at 351; *id.* at 354-55 (Rehnquist, J., dissenting). But much more than just the forum is at stake when a district court considers a foreign governmental entity's claim to be an agency or instrumentality under the FSIA. The defendant's status as a foreign state under the FSIA determines not only the forum but also the defendant's right to a bench trial – a central guarantee to foreign states under the FSIA – and its entitlement to special protections governing attachment and

execution. *See Ruggiero*, 639 F.2d at 878; 28 U.S.C. §§ 1441(d), 1610-1611.

Accordingly, § 1447(d) should not be interpreted to preclude an appellate court from reviewing the important question whether the district court wrongly denied a foreign state's right to a federal bench trial. *See Osborn*, slip op. at 2, 3 (Souter, J., concurring in part and dissenting in part) (courts should "disaggregat[e] . . . a remand order from a substantive determination" about the "denial of [a] benefit" bestowed by Congress and "allow[] appeals" on that "important matter"); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir. 1993) (Alito, J.) (reviewing an important question apart from the propriety of remand decided by the district court in its remand order); *cf. City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140, 143 (1934).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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STATUTORY PROVISIONS INVOLVED

28 U.S.C. .§ 1291 provides:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1367 provides:

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24

of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1391(f) provides:

§ 1391. Venue generally

* * * * *

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought –

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

28 U.S.C. § 1441 provides:

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(c)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if –

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determi-

nation of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1442 provides:

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

28 U.S.C. § 1447 provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1447 (1982) provides:

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. § 1603 provides:

§ 1603. Definitions

For purposes of this chapter –

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604 provides:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(2) provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * * * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * * *

28 U.S.C. § 1606 provides:

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

The Budget Transparency and Accountability Act, S.B.C., ch. 23 (2000), provides in pertinent part:

Definitions and interpretation

1 (1) In this Act:

"education and health sector organization" means

(a) the following as defined in section 1 of the *College and Institute Act*:

(i) a university;

(ii) an institution,

(b) the following as defined in section 1 of the *School Act*:

(i) a board;

(ii) a francophone education authority,

(c) a board as defined in section 1 of the *Health Authorities Act*,

(d) a hospital as defined in section 1 of the *Hospital Act*,

and includes

(e) a corporation or organization that, under generally accepted accounting principles, is considered to be controlled by an education and health sector organization, and

(f) a corporation or organization that is included in this definition by regulation under section 24 (2) (d) (ii),

but does not include a corporation or organization that is excluded from this definition by regulation under section 24 (2) (d) (ii);

"government organization" means a corporation or other organization that is within the government reporting entity, other than the government itself;

"government reporting entity" means

(a) the government as reported through the consolidated revenue fund,

(b) government corporations other than those that are government corporations solely by reason of being under an Act agents of the government, and

(c) education and health sector organizations,

and includes

(d) each of the corporations or organizations that, under generally accepted accounting principles, is considered to be controlled by a government organization, and

(e) corporations and organizations that are included within the government reporting entity by regulation under section 24(2)(d)(i)

but does not include corporations and organizations that are excluded from the government reporting entity by regulation under section 24(2)(d)(i);

"minister" means

(a) a member of the Executive Council,

(b) in the case of a reference to "the minister", the minister assigned responsibility for the administration of the provision, or

(c) in the case of a reference to "responsible minister", the minister who is the appropriate minister within the meaning of section 24 of the *Financial Administration Act*;

"ministry" means

(a) a ministry of the executive government of British Columbia, or

(b) any part of the executive government of British Columbia not within a ministry that is designated by the Lieutenant Governor in Council as a ministry for the purposes of this Act;

"public accounts" means the public accounts under section 9;

"quarterly report" means a report under section 10;

"secretary to Treasury Board" means

(a) the person appointed under section 3(2) of the *Financial Administration Act*, or

(b) if no person is appointed under that provision, the deputy minister to the minister;

"self-supported government enterprise" means a corporation that

(a) is within the government reporting entity,

(b) is carrying on a business,

(c) provides goods and services to persons outside the government reporting entity as its principal activity, and

(d) in the normal course of its operations, maintains its operations and meets its liabilities substantially from revenue from sources outside the government reporting entity;

"staff utilization" means, for a fiscal year, the full time equivalent of the number of persons employed in the fiscal year whose salaries are paid directly by the taxpayer-supported government reporting entity;

"surplus" or **"deficit"** means the result of the revenues and expenses after including the forecast allowance, if any;

"taxpayer-supported government reporting entity" means the government reporting entity excluding self-supported government enterprises.

(2) To the extent that this Act or regulations under this Act do not otherwise define a word or expression used in this Act, the definitions in the *Financial Administration Act* apply.

(3) Where this Act refers to an action of the government reporting entity, or of the taxpayer-supported government reporting entity, the reference is to be read as an action of the government or of one or more government organizations included within the entity, or both, as applicable.

Part 1 – Fiscal Plan: Budget and Estimates

* * * * *

Estimates content

5 (1) The main estimates for a fiscal year must be prepared in accordance with this section and with the accounting policies as established by Treasury Board.

(2) The main estimates for a fiscal year must include the following:

(a) for the government, the proposed *Supply Act* appropriations for the fiscal year;

(b) for the government reporting entity, for both the fiscal year and the preceding fiscal year,

(i) a statement of the forecast revenues and expenses and the resulting forecast surplus or deficit, and

(ii) schedules of

(A) a reconciliation of that surplus or deficit with the forecast change in debt,

(B) a forecast of the balance sheet as at the end of each of those fiscal years, and

(C) a forecast of total revenues and total expenses, before netting of revenues against expenses or expenses against revenue;

(c) for the taxpayer-supported government reporting entity, for the fiscal year and for the preceding fiscal year, a forecast of staff utilization, except in relation to the staff of education and health sector organizations;

(d) for government organizations in the taxpayer-supported government reporting entity that are not

education and health sector organizations, the forecast of revenues and expenses for each of them whose revenues or expenses are of a material amount in the fiscal year and the preceding fiscal year;

(e) a summary of the accounting policies of the government reporting entity as established by Treasury Board;

(f) any other information the minister considers appropriate.

(3) Nothing in this section requires the Legislative Assembly to vote appropriations other than in respect of the consolidated revenue fund.

When estimates are to be presented

6 (1) Subject to subsection (2), the minister must present the main estimates for a fiscal year to the Legislative Assembly with the budget for that fiscal year, on the third Tuesday in February in the immediately preceding fiscal year.

(2) If

(a) a general election is underway on the third Tuesday in February or as of that date has been recently completed, or

(b) there has been a general election in a fiscal year before passage by the Legislative Assembly of the final *Supply Act* for that fiscal year,

the main estimates referred to in subsection (1) must be presented to the Legislative Assembly no later than 90 days after the post-election appointment of the Executive Council.

* * * * *

Part 2 – Fiscal Reports: Public Accounts and Other Reports

Public accounts

9 (1) Annual public accounts for each fiscal year must be prepared in accordance with this section and with the accounting policies as established by Treasury Board.

(2) The public accounts for a fiscal year must include the following:

(a) for the government reporting entity, for the fiscal year and the preceding fiscal year, financial statements of

(i) the revenues and expenses and the resulting surplus or deficit,

(ii) the balance sheet as at the end of those fiscal years, and

(iii) changes in cash and temporary investments;

(b) for the government reporting entity, a supplementary schedule that includes amounts held and administered in trust;

(c) for the taxpayer-supported government reporting entity,

(i) a statement of the debt guaranteed by that entity as at the end of the fiscal year, and

(ii) a supplementary schedule that includes staff utilization for that fiscal year, except in relation to the staff of education and health sector organizations;

(d) for the government as reported through the consolidated revenue fund, supplementary schedules that include

(i) appropriations for the fiscal year compared to the actual expenditures for that fiscal year,

(ii) assets, debts and obligations written off in that fiscal year under section 17 of the *Financial Administration Act*,

(iii) debts and obligations forgiven in that fiscal year under section 18 of the *Financial Administration Act*,

(iv) remissions made in that fiscal year under section 19 of the *Financial Administration Act*, and

(v) information required by

section 25 (2) *[amounts received by government]*,

section 26 (3) *[liabilities in excess of appropriation]*

section 70 (2) and (3) *[borrowing transactions and leases]*, and

section 74 (3) *[payments on guarantees and indemnities]*

of the *Financial Administration Act*;

(e) a summary of the accounting policies of the government reporting entity as established by Treasury Board;

(f) other information required to be included in the public accounts by Treasury Board or by this or any other Act;

(g) other information the minister considers appropriate;

(h) the report of the Auditor General as required by section 11 (1) of the *Auditor General Act*.

(3) By August 31 in each year, the minister must make public the public accounts for the previous fiscal year.

Quarterly reports

10 (1) Quarterly reports must be prepared in accordance with this section and with the accounting policies as established by Treasury Board.

(2) Each quarterly report must include the following:

(a) for the government reporting entity, statements of

(i) the revenues and expenses, and the resulting surplus or deficit, for the period from April 1 in the

fiscal year to which the report applies to the end of the quarter to which the report applies,

(ii) the debt at the end of the quarter to which the report applies, and

(iii) in respect of the items referred to in subparagraphs (i) and (ii),

(A) the anticipated amounts, in respect of that fiscal year, through that quarter, and

(B) the actual amounts, in respect of the previous fiscal year, through the comparable quarter;

(b) for the government reporting entity, statements of

(i) the forecast of revenues and expenses and the resulting surplus or deficit for the fiscal year to which the quarterly report applies,

(ii) the forecast of the debt as at the end of that fiscal year, and

(iii) in respect of the items referred to in subparagraphs (i) and (ii),

(A) the amounts provided in the estimates in respect of that fiscal year, and

(B) the actual amounts in respect of the previous fiscal year;

(c) a supplementary schedule that presents a forecast of staff utilization of the taxpayer-supported government reporting entity for the fiscal year to which the quarterly report applies, except in relation to the staff of education and health sector organizations;

(d) other information the minister considers appropriate.

(3) A quarterly report must be made public on or before

(a) September 15, in respect of the first 3 months of the fiscal year,

(b) November 30, in respect of the first 6 months of the fiscal year,

(c) February 28, in respect of the first 9 months of the fiscal year, and

(d) May 31, in respect of the preceding fiscal year, if estimates for the current fiscal year have not been presented to the Legislative Assembly by that date.

(4) For a quarterly report for the first 9 months of the fiscal year, the information required under subsection (2) may be made public on the third Tuesday in February of that fiscal year, with the main estimates presented to the Legislative Assembly for the immediately following fiscal year.

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Part 3 – Service Plans

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Service plans for ministries and government organizations

13 (1) Annual service plans for each ministry and each government organization other than an education and health sector organization must be made public in accordance with this section.

(2) In the case of a service plan for a ministry, the plan must

(a) cover the ministry and other appropriations of the responsible minister,

(b) be made public by the responsible minister on the date when the main estimates are presented to the Legislative Assembly for each fiscal year, and

(c) address that fiscal year and the following 2 fiscal years.

(3) In the case of a service plan for a government organization other than an education and health sector organization, the plan must

(a) be made public by the responsible minister on the date when the main estimates are presented to the Leg-

islative Assembly for each fiscal year of the organization, and

(b) address that fiscal year and the following 2 fiscal years.

(4) Subject to section 19 (5) *[exception if disclosure would be harmful]*, a service plan under this section must be consistent with the current government strategic plan and must

(a) include a statement of goals,

(b) identify specific objectives and performance measures,

(c) in relation to a project to which section 14 *[major capital project plans]* applies, include the information required under that section,

(d) include other prescribed information, if applicable,

(e) for a ministry's service plan,

(i) include a statement that the responsible minister is accountable for the basis on which the service plan is prepared and for achieving the specific objectives in that plan, and

(ii) provide for the signature of the responsible minister to that statement,

(f) if expected results that are specified by regulation of Treasury Board, under the *Balanced Budget and Ministerial Accountability Act* for the purpose of section 5 (3) of that Act are pertinent to a ministry's annual service plan,

(i) include a statement that the member of the Executive Council who has responsibility for those results is accountable for achieving them, and

(ii) provide for the signature of the member to that statement, and

(g) include other information the responsible minister or government organization considers appropriate.

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Part 4 – Service Plan Reports

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Annual service plan reports for ministries and government organizations

16 (1) Annual service plan reports for each ministry and each government organization must be made public in accordance with this section.

(2) In the case of an annual service plan report for a ministry, the report must

(a) cover the ministry and other appropriations of the responsible minister,

(b) compare actual results for the preceding fiscal year with the expected results identified in the service plan under section 13 for that fiscal year,

(c) be made public by the responsible minister no later than August 31 in each year,

(d) include a statement that the responsible minister is accountable for those actual results,

(e) provide for the signature of the responsible minister to that statement, and

(f) if expected results that are specified by regulation of Treasury Board, under the *Balanced Budget and Ministerial Accountability Act* for the purpose of section 5 (3) of that Act are pertinent to a ministry's annual service plan report,

(i) include a statement that the member of the Executive Council who has responsibility for those results is accountable for them, and

(ii) provide for the signature of the member to that statement.

(3) In the case of an annual service plan report for a government organization, the report must

(a) compare actual results for the preceding fiscal year with the expected results identified in the service plan under section 13 for that fiscal year, and

(b) be made public by the responsible minister no later than August 31 or the end of 5 months after the end of the preceding fiscal year of the government organization, whichever comes first.

(4) On a date not earlier than 30, nor later than 60, days after the annual service plan report for a government organization specified by regulation of Treasury Board is made public under subsection (3) (b) by the responsible minister, the specified government organization must conduct a public meeting at a location in British Columbia where that organization carries on significant operations, for the purposes of presenting to the public the annual service plan report, required under this section, of that organization.

(5) Each government organization specified under subsection (4) must give at least 14 days notice of the public meeting required under subsection (4) by a notice that states the time, date, place and purpose of the public meeting and other information that may be prescribed.

(6) If another Act requires a responsible minister to present a report to the Legislative Assembly respecting the activities of a ministry or government organization for a fiscal year, the report under this section satisfies that requirement subject to any additional reporting requirements established by the other Act.

(7) An annual service plan report under this section may be combined with a service plan for the following fiscal year under section 13, so long as the service plan is made public in accordance with that section.

Part 5 – General

* * * * *

Government organizations must provide required information

20 (1) Government organizations must provide

(a) in the case of service plans, major capital project plans and annual service plan reports, the minister who is the responsible minister in relation to those plans and reports, and

(b) in the case of the estimates, quarterly reports, public accounts and any other cases, the minister assigned responsibility for the administration of this Act,

with the documents and other information required for that minister to comply with the requirements of this Act.

(2) Without limiting subsection (1), for the purposes of this Act, the applicable minister may require a government organization to provide information as requested by that minister and may establish a date by which the information must be provided.

(3) If information is required under subsection (2), the government organization must provide the information to the applicable minister

(a) by the date established under subsection (2), or

(b) if no date is established, as soon as reasonably practicable.

(4) If a government organization does not provide the information required or requested in accordance with this section, a person authorized in writing by the applicable minister may examine the books, records of account, documents and other records of the government organization for the purpose of obtaining the information.

(5) If an examination is authorized under subsection (4), the government organization and every officer and employee of it must take all necessary steps to

(a) make available the facilities and records of the organization, and

(b) assist in the conduct of the examination.

(6) A person must not hinder or obstruct the person conducting an examination under subsection (4).

The Financial Information Act, R.S.B.C., ch. 140 (1996), provides in pertinent part:

Definitions

1 In this Act:

"corporation" means

(a) a corporation, association, board, commission or society to which a grant or advance may be made, or the borrowings of which may be guaranteed by the government, under the authority of the enactments in Schedule 1, or

(b) a public body, as defined in section 1 of the *Financial Administration Act*, that is listed in Schedule 2;

"minister" means

(a) in respect of the corporations referred to in paragraph (a) of the definition of "corporation", the minister who administers the Acts in Schedule 1, or

(b) in respect of the corporations in Schedule 2, the minister designated by the Lieutenant Governor in Council.

The Financial Information Regulation, B.C. Reg. 371/93 (1993), provides in pertinent part:

Definition

1 In this regulation **"Act"** means the *Financial Information Act*.

* * * * *

Schedule 1

[am. B.C. Reg. 318/2000; 249/2002, ss. 5-7.]

Statements and Schedules of Financial Information

General

1 (1) The following statements and schedules of financial information must be prepared in accordance with section 2 (2) and (3) of the *Financial Information Act* and be collectively titled the "Statement of Financial Information":

(a) a statement of assets and liabilities;

(b) an operational statement;

(c) a schedule of debts;

(d) a schedule of guarantee and indemnity agreements;

(e) a schedule showing remuneration and expenses paid to or on behalf of each employee, as required by section 6;

(f) a schedule showing the payments for each supplier of goods or services, as required by section 7.

(2) Sections 2 to 7 prescribe the minimum financial information to be contained in the statements and schedules prepared in compliance with the Act.

(3) The statements and schedules must be prepared

(a) on a consolidated basis where a parent and subsidiary corporate relationship exists, and

(b) either on a consolidated basis or for each fund where fund accounting is employed.

(4) The Statement of Financial Information must include notes to the financial statements required in sections 2 and 3 that disclose

(a) the accounting principles and policies followed in preparing the financial statements, and

(b) commitments and contingent liabilities of a long term nature.

(5) The Statement of Financial Information must include notes to the schedules and statements required in sections 4 to 7 that disclose the accounting principles and policies followed.

The Financial Administration Act, R.S.B.C., ch. 138 (1996), provides in pertinent part:

Part 1 – Definitions and Application

Definitions

1 In this Act:

"appropriation" means

(a) an appropriation in a *Supply Act*,

(b) a provision in this or another Act that expressly

(i) authorizes or directs payment from or out of the consolidated revenue fund,

(ii) authorizes payment from or out of a special fund, or

(iii) dispenses with the need for another appropriation, or

(c) an appropriation by special warrant under section 24;

"banking instrument" means a cheque, draft, telegraphic or electronic transfer or other similar instrument;

"consolidated revenue fund" means the consolidated revenue fund referred to in section 12;

"currency" means the currency of a country or any other unit of monetary value;

"designated institution" means an institution designated under section 79 (1) (d);

"estimates" means the estimates of revenue and expenditure for a fiscal year presented to the Legislative Assembly, being

(a) the main estimates presented annually, and

(b) any supplementary estimates for the fiscal year;

"expenditure" includes amounts appropriated for amortization, allowances for doubtful accounts or other non-cash expenses and, in relation to this, a reference to paying, spending or otherwise expending amounts includes

the application of non-cash expenses to the purposes for which they are appropriated;

"fiscal year", when used to mean the fiscal year of the government, means the period from April 1 in one year to March 31 in the next year;

"general fund" means the general fund, referred to in section 12 (2), of the consolidated revenue fund;

"government" does not include government corporations;

"government body" means

(a) a government corporation,

(b) a hospital district board, a board of school trustees or a francophone education authority as defined in the *School Act*,

(c) a university or an institution as defined in the *College and Institute Act*,

(c.1) [Repealed 2004-33-15.]

(c.2) the agency as defined in the *Open Learning Agency Act*, and

(d) any other local or Provincial public authority designated by regulation of the Lieutenant Governor in Council;

"government corporation" means a corporation

(a) that is, under an Act, an agent of the government,

(b) of which the government owns, directly or indirectly, more than 50% of the issued voting shares, or

(c) that is controlled by the government, and for the purpose of this definition a corporation is controlled by the government when a majority of the members of the corporation or of its board of directors or board of management consists of either or both of the following:

(i) persons appointed as members by the Lieutenant Governor in Council, by a minister or by an Act;

(ii) public officers acting as public officers;

"investment management corporation" means the British Columbia Investment Management Corporation established under Part 3 of the *Public Sector Pension Plans Act*;

"minister" means a member of the Executive Council;

"Minister of Finance" means the minister who has administration of this Act;

"ministry" means

(a) a ministry of the executive government of British Columbia, or

(b) a branch of the executive government of British Columbia that is not part of a ministry but is designated by the Lieutenant Governor in Council as a ministry for the purposes of this Act;

"money received for another person" means money that is paid to the government or a public officer under an agreement or undertaking, or by way of gift or bequest, and that is to be paid to another person specified in the agreement or undertaking or by the donor of the gift or bequest, but does not include money received as reimbursement for or as a contribution towards expenditures made by the government;

"pension fund" means

(a) a pension fund established under the *Legislative Assembly Allowances and Pension Act* or continued under the *Public Sector Pension Plans Act*,

(b) any pension fund held in trust by the government or a public officer, and

(c) any prescribed pension fund that has been established for the benefit of employees of a government body;

"pooled investment portfolio" means a portfolio of investments or loans, or both, established under section 43;

"property" does not include money or securities;

"public accounts" means the public accounts under section 9 of the *Budget Transparency and Accountability Act*;

"public body" means

(a) an agency of the government,

(b) a board, commission, council or other body of persons, whether or not incorporated, all the members or all the members of the board of management or board of directors of which are appointed by an Act, an order of the Lieutenant Governor in Council or a minister of the government,

(c) a corporation, more than 50% of the shares or ownership of which is, directly or indirectly, vested in the government, or

(d) a corporation, association, board, commission or society to which a grant or advance of public money is made, or the borrowings of which may be guaranteed by the government under the authority of any Act,

but does not include the B.C. Ferry Authority, established under the *Coastal Ferry Act*, or British Columbia Ferry Corporation;

"public debt" means direct debt obligations of the government;

"public money" means all money received, held or collected by, for or on behalf of the government and includes

(a) revenues of the government,

(b) special funds,

(c) money borrowed by the government or received through the issue and sale of securities, and

(d) trust funds,

but does not include money received, held or collected by a government corporation unless that money is payable to the government under an enactment;

"public officer" includes a minister and a person employed in the public service of British Columbia;

"public property" means all property belonging to the government, but does not include property belonging to a government corporation;

"securities" means bonds, debentures, deposit certificates, promissory notes, treasury bills or other evidences of indebtedness, shares and stock, and includes any documents commonly known as securities;

"special account" means an account in the general fund where the authorization to spend money from the account is located in an Act other than a *Supply Act*;

"special fund" means a fund designated as a special fund by the Lieutenant Governor in Council;

"Treasury Board" means the Treasury Board continued by this Act;

"trust funds" means

(a) money held in trust by the government or a public officer, and

(b) pension funds, sinking funds maintained by the government, money received for another person and money paid to the government as a deposit to ensure the doing of any act or thing;

"vote" means an appropriation under a *Supply Act* identified in the main or supplementary estimates as a vote.

* * * * *

Part 2 – Organization

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Management of capital expenditures

4.1 (1) Without limiting any relevant authority under another provision of this or any other Act, Treasury Board may make regulations or issue directives respecting the planning, management and reporting of capital expenditures by government and government bodies.

(2) Without limiting subsection (1), Treasury Board may make regulations or issue directives respecting capital expenditures as follows:

(a) requiring government and government bodies to have approval of Treasury Board or its delegate before making commitments to capital expenditures;

(b) establishing conditions on approval required under paragraph (a);

(c) establishing requirements relating to capital management processes, including procurement, contract provisions, project management, financial controls and accounting practices;

(d) establishing requirements for capital plans, business cases, requests for approval, tendering and other procurement documents, progress reports, completion reports and post-expenditure evaluation reports, including establishing requirements respecting their form, content and frequency.

(3) Regulations and directives under this section may establish different requirements or conditions respecting

(a) different classes of capital expenditure as specified by regulation or directive, and

(b) different government bodies or classes of government body.

(4) In addition to any conditions established by regulation or directive, if approval is required under subsection (2)(a), approval in a specific case may be made on conditions Treasury Board or its delegate considers appropriate.

(5) Requirements under this section are additional to those established by any other enactment.

* * * * *

Comptroller General

8 (1) The Lieutenant Governor in Council must appoint a person to be Comptroller General in the Ministry of Finance, and the Comptroller General is an employee under the *Public Service Act*.

(2) The Comptroller General

(a) has access at all times to all ministries and branches of the government and to their records,

(b) may require from any public officer information and explanations necessary for the performance of the Comptroller General's duties,

(c) may, on the direction of the Treasury Board,

(i) require from any officer or employee of a public body information and explanations necessary to enable the Comptroller General to determine whether public money disbursed or spent by the government has been or is being applied for the purpose for which it was appropriated, and

(ii) examine and report on any or all of the financial and accounting operations of a government corporation, and

(d) may examine any person under oath with respect to any matter that, under any Act, the Comptroller General is required or authorized to check, examine or control, and for the purposes of the examination the Comptroller General has the powers, protection and privileges of a commissioner under sections 12, 15 and 16 of the *Inquiry Act*.

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Part 4 – Expenditure

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Insurance and Risk Management Account

30 (1) In this section:

"account" means the Insurance and Risk Management Account continued under subsection (2);

"participants" means

(a) government bodies,

(b) ministries, and

(c) persons or public authorities, or classes of persons or public authorities, designated by regulation;

"regulations" means regulations made under subsection (8).

(2) The Insurance and Risk Management Account is continued as a special account for the purpose of providing insurance or risk management services, or both, to participants or for the benefit of participants.

(3) The government may, subject to the regulations,

(a) enter into agreements or make arrangements with participants, and

(b) enter into agreements for the benefit of participants

respecting insurance and risk management services to be provided in relation to the account.

(4) The following must be paid into the account:

(a) earnings of the account;

(b) amounts paid by or in respect of participants under agreements or arrangements made under subsection (3);

(c) amounts required to be paid under the regulations;

(d) amounts appropriated for the account by a *Supply Act*.

(5) The following may be paid out of the consolidated revenue fund:

(a) amounts payable out of the account by the government in respect of an agreement or arrangement made under subsection (3);

(b) amounts required to be paid out of the account in accordance with the regulations.

(6) If an amount to be paid under subsection (5) is less than the balance in the account, it must be paid out of the account.

(7) If an amount to be paid under subsection (5) is greater than the balance in the account, the balance of the account must be paid out and the difference must be recorded as a deficit against the account.

(8) The Lieutenant Governor in Council may make regulations as follows:

(a) designating a person or public authority, or a class of persons or public authorities, as a participant;

(b) designating persons who may enter into agreements or make arrangements under subsection (3) on behalf of the government;

(c) respecting the terms and conditions under which an agreement or arrangement may be made under subsection (3);

(d) respecting amounts required to be paid into the account under subsection (4) or out of the account under subsection (5);

(e) respecting payments made under subsection (5) in the circumstances referred to in subsection (7).

(9) If a designation is made under subsection (8) (b), it may be a designation of a person by name or a designation of a title or office and, if a title or office is designated, the designation applies to every person holding or appointed to that title or office while that person holds that title or office.

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Part 8 – Liabilities

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Authority to lend money to government bodies

53 (1) Subject to subsection (4), the government may lend money in any currency to government bodies.

(2) The Lieutenant Governor in Council may authorize the Minister of Finance to make loans on behalf of the government to government bodies under this or another Act.

(3) In an authorization under subsection (2), the Lieutenant Governor in Council

(a) must establish a maximum amount in accordance with section 53.1, and

(b) may establish other restrictions, limits or conditions on the lending of money under the authorization.

(4) The government may not lend money to government bodies under the authority of this or another Act

(a) without an authorization of the Lieutenant Governor in Council under subsection (2),

(b) contrary to any restrictions, limits or conditions on the borrowing authority of government bodies unless permitted by section 53 (5) or 54 (6),

(c) in excess of the maximum amount established under subsection (3) (a), or

(d) contrary to any restrictions, limits or conditions established under subsection (3) (b).

(5) If a loan to a government body is authorized under subsection (2), any approval or determination by the Lieutenant Governor in Council or the Minister of Finance that any other Act requires respecting borrowing by the government body is not required with respect to that loan.

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Assumption of government body debt obligations

56.3 (1) Subject to the approval of the Lieutenant Governor in Council, the government may assume debt obligations of a government body with the agreement of the government body.

(2) On the assumption by the government of debt obligations under subsection (1),

(a) the debt obligations become enforceable against the government,

(b) the government body is released from all liability for the debt obligations, and

(c) the assets of any sinking fund for the repayment of the debt obligations become the assets of the government.

(3) In this section, **"debt obligations"** includes parts of "debt obligations".

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Regulations respecting government corporations

75 (1) The Lieutenant Governor in Council may make regulations as follows:

(a) respecting the terms and conditions, and, despite any other Act, restricting or limiting the circumstances, under which a government corporation may enter banking arrangements, lend money, borrow money, give a guarantee or indemnity, give, grant or assume a mortgage or lien on property or acquire property by way of lease;

(b) appointing the Minister of Finance as fiscal agent for a government corporation;

(c) defining the role and powers of the Minister of Finance as fiscal agent for a government corporation;

(d) prescribing fees to be paid to the government by a government corporation for services provided whether or not there is an obligation on the government to provide the services.

(2) Without limiting subsection (1) (a), the regulations may do any of the following:

(a) designate persons by whom a guarantee or indemnity may be given on behalf of a government corporation;

(b) specify circumstances in which, before a guarantee or indemnity is given, approval must be obtained from the Lieutenant Governor in Council, the Treasury Board, a minister or another person;

(c) require that in specified circumstances, the maximum amount of the liability in respect of which the Treasury Board, a minister or other person may approve a guarantee or indemnity is limited to a prescribed amount;

(d) place those constraints, conditions and limitations on the giving of guarantees and indemnities and on the exercise of the power of approval referred to in paragraph (b) or (c) that are considered desirable.

(3) If a designation is made under subsection (2) (a), it may be a designation of a person by the person's name or it may be a designation of a title or office and, if a title or office is designated, the designation applies to every person holding or appointed to that title or office while the person holds that title or office.

(4) A regulation under this section may be made applicable to government corporations generally or to a government corporation specified in the regulation.

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Part 9.1 – Commodity Derivatives

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Commodity derivatives by government bodies

79.3 (1) Despite any other Act, a government body may not enter into commodity derivatives except in accordance with this section.

(2) Subject to any restriction, limit or condition established under subsection (3), a government body specified under that subsection may enter into commodity derivatives, including commodity derivatives with or through the agency of the Minister of Finance.

(3) The Treasury Board may, by regulation,

(a) specify government bodies for the purposes of this section, and

(b) establish restrictions, limits and conditions on the authority of a government body specified under paragraph (a) to enter into commodity derivatives.

(4) At the request of a government body specified under subsection (3), the Minister of Finance may act as its agent in exercising the authority given to that body under subsection (2).

* * * * *

The Commodity Derivatives by Government Bodies Regulation, B.C. Reg. 407/2000 (2000), provides:

COMMODITY DERIVATIVES BY GOVERNMENT BODIES REGULATION

Specified government bodies

1 (1) The following are specified as government bodies for the purposes of section 79.3 of the *Financial Administration Act*:

(a) British Columbia Hydro and Power Authority;

(b) British Columbia Power Exchange Corporation.

(2) The following are specified as government bodies for the purposes of section 79.3 of the *Financial Administration Act*:

(a) British Columbia Ferry Corporation.

Restrictions, limits and conditions to enter into commodity derivatives

2 (1) The authority of a government body specified in section 1(1) to enter into commodity derivatives is subject to the following restrictions, limits and conditions:

(a) British Columbia Hydro and Power Authority must have established and be maintaining a risk management committee;

(b) the risk management committee referred to in paragraph (a) must include among its responsibilities the development and implementation of a risk management policy with respect to commodity derivatives entered into by any government body specified in section 1(1).

(2) The authority of British Columbia Ferry Corporation to enter into commodity derivatives is subject to the following restrictions, limits and conditions:

(a) British Columbia Ferry Corporation must have established and be maintaining a risk management committee;

(b) the risk management committee referred to in paragraph (a) must include among its responsibilities the development and implementation of a risk management policy with respect to commodity derivatives entered into by British Columbia Ferry Corporation;

(c) the commodity derivatives must only be entered into with or through the agency of the Minister of Finance and Corporate Relations.

The Income Tax Act, R.S.C., ch. 1 (5th Supp.) (1985), provides in pertinent part:

Income Tax Act
PART I INCOME TAX
DIVISION H EXEMPTIONS

Miscellaneous exemptions

149. (1) No tax is payable under this Part on the taxable income of a person for a period when that person was

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(d) a corporation, commission or association all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is Her Majesty in right of Canada or Her Majesty in right of a province;

(d.1) a corporation, commission or association not less than 90% of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is Her Majesty in right of Canada or Her Majesty in right of a province;

(d.2) a corporation all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is a corporation, commission or association to which this paragraph or paragraph (d) applies for the period;

(d.3) a corporation, commission or association not less than 90% of the shares (except directors' qualifying shares) or of the capital of which was owned by

(i) one or more persons each of which is Her Majesty in right of Canada or a province or a person to which paragraph (d) or (d.2) applies for the period, or

(ii) one or more municipalities in Canada in combination with one or more persons each of which is Her Majesty in right of Canada or a province or a person to

which paragraph 149(1)(d) or 149(1)(d.2) applies for the period;

(d.4) a corporation all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is a corporation, commission or association to which this paragraph or any of paragraphs (d) to (d.3) applies for the period;

(d.5) subject to subsections 149(1.2) and 149(1.3), a corporation, commission or association not less than 90% of the capital of which was owned by one or more municipalities in Canada, if the income for the period of the corporation, commission or association from activities carried on outside the geographical boundaries of the municipalities does not exceed 10% of its income for the period;

(d.6) subject to subsections (1.2) and (1.3), a particular corporation all of the shares (except directors' qualifying shares) or of the capital of which was owned by one or more persons each of which is a corporation, commission or association to which paragraph (d.5) or this paragraph applies for the period if the income for the period of the particular corporation from activities carried on outside

(i) if paragraph 149(1)(d.5) applies to the other corporation, commission or association, the geographical boundaries of the municipalities referred to in that paragraph in its application to that other corporation, commission or association, or

(ii) if this paragraph applies to the other corporation, commission or association, the geographical boundaries of the municipalities referred to in subparagraph 149(1)(d.6)(i) in its application to that other corporation, commission or association,

does not exceed 10% of its income for the period;

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The Income Tax Act, R.S.B.C., ch. 215 (1996), provides in pertinent part:

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Part 1 – Income Tax

* * * * *

Division 4 – Individual and Corporate Income Tax

* * * * *

Exemptions

27 (1) Subject to section 25, no tax is payable under this Act by any person for a period when the person

(a) was exempt from tax by virtue of section 149 (1) of the federal Act, or

(b) was a non resident owned investment corporation.

(2) Any definitions or descriptions in the federal Act applying to a person referred to in subsection (1) apply for the purposes of this Act unless otherwise provided.

(3) [Repealed 1999-47-12.]

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The Land Act, R.S.B.C., ch. 245 (1996), provides in pertinent part:

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Reserves

15 (1) In this section and section 16, **"government body"** means the Provincial government, a government corporation as defined in paragraphs (b) and (c) of the definition of "government corporation" in the *Financial Administration Act*, the federal government or a prescribed organization.

(2) The Lieutenant Governor in Council may, by order, reserve Crown land from disposition under this Act for any purpose that the Lieutenant Governor in Council considers advisable in the public interest, including for the use of a government body.

(3) An order under subsection (2) may authorize a government body to place, construct, maintain or operate any works, structures or other improvements on the reserved land.

(4) An order under subsection (2) may be subject to any terms and conditions the Lieutenant Governor in Council considers necessary or advisable.

(5) The Lieutenant Governor in Council may amend or cancel all or part of a reserve established under this or a former Act.

(6) An order under subsection (2) does not affect the minister's powers under section 14.

* * * * *

The Lobbyists Registration Act, S.B.C., ch. 42 (2001), provides in pertinent part:

Interpretation

1 (1)

In this Act:

"client" means a person or organization on whose behalf a consultant lobbyist undertakes to lobby;

"consultant lobbyist" means an individual who, for payment, undertakes to lobby on behalf of a client;

"in-house lobbyist" means an individual who is employed by a person or organization and a significant part of whose duties as an employee is to lobby on behalf of

(a) the employer, or

(b) if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary;

"lobby" means,

(a) in relation to either a consultant lobbyist or an in-house lobbyist, to communicate with a public office holder in an attempt to influence

(i) the development of any legislative proposal by the government of British Columbia or by a member of the Legislative Assembly,

(ii) the introduction of any bill or resolution in the Legislative Assembly or the amendment, passage or defeat of any bill or resolution that is before the Legislative Assembly,

(iii) the making or amendment of any regulation as defined in the *Regulation Act* or any order in council,

(iv) the development or amendment of any program or policy of the government of British Columbia, or

(v) the awarding of any contract or financial benefit by or on behalf of the government of British Columbia, and

(b) in relation only to a consultant lobbyist, to arrange a meeting between a public office holder and any other person;

"organization" means

(a) a business, trade, industry, professional or voluntary organization,

(b) a trade union or labour organization,

(c) a chamber of commerce or board of trade,

(d) a charitable or non-profit organization, association, society, coalition or interest group, and

(e) a government, other than the government of British Columbia;

"payment" means money or anything of value and includes a contract, promise or agreement to pay money or anything of value;

"public office holder" means

(a) a member of the Legislative Assembly and any person on the member's staff,

(b) an officer or employee of the government of British Columbia,

(c) a person who is appointed to any office or body by or with the approval of the Lieutenant Governor in Council, other than a person appointed on the recommendation of the Legislative Assembly,

(d) a person who is appointed to any office or body by or with the approval of a minister of the government of British Columbia, and

(e) an officer, director or employee of any government corporation as defined in the *Financial Administration Act*,

but does not include a judge or a justice of the peace;

"registrar" means the person designated as registrar under section 7(1);

"senior officer", in relation to an organization, means the most senior officer of the organization who is compensated for performing his or her duties;

"undertaking" means an undertaking by a consultant lobbyist to lobby on behalf of a client, but does not include an undertaking by an employee to do anything

(a) on the sole behalf of the employer, or

(b) if the employer is a corporation, at the direction of the employer on behalf of a subsidiary of the employer or any corporation of which the employer is a subsidiary.

(2) An officer who is compensated for performing his or her duties is considered to be an employee for the purposes of the definition of "in-house lobbyist" in subsection (1) and for the purposes of sections 3 and 4.

(3) For the purposes of this Act, the following are not considered to be in-house lobbyists:

(a) officers and employees of the Legislative Assembly appointed under section 39 of the *Constitution Act*;

(b) persons appointed under the *Public Service Act*;

(c) employees of prescribed government corporations as defined in the *Financial Administration Act* or of other prescribed government institutions.

* * * * *

Heritage Special Direction No. HC2 to the British Columbia Utilities Commission, Order in Council No. 1123 (Nov. 27, 2003), provides:

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 1123 Approved and Ordered Nov. 27, 2003

/s/ [Illegible]
Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that, effective April 1, 2004, the attached Special Direction No. HC2 is made.

/s/ [Illegible]
Minister of Energy and Mines

/s/ [Illegible]
Presiding Member of the Executive Council

HERITAGE SPECIAL DIRECTION NO. HC2 TO THE BRITISH COLUMBIA UTILITIES COMMISSION

Definitions

1 In this Special Direction:

"Act" means the *BC Hydro Public Power Legacy and Heritage Contract Act*;

"debt" means, in relation to a fiscal year of the authority, the amount obtained by

(a) adding the outstanding amounts of the following at the end of the fiscal year:

(i) borrowings;

(ii) bonds;

(iii) notes;

(iv) debentures, and

(b) deducting from the amount determined under paragraph (a) the sum of the of the following amounts at the end of the fiscal year:

(i) sinking funds;

(ii) temporary investments;

(iii) repurchased debt;

"equity" means the sum of the following amounts at the end of the fiscal year:

(a) retained earnings;

(b) deferred revenue;

(c) contributions arising from the Columbia River Treaty;

(d) contributions in aid of construction;

"government policy directive" means a directive in writing to the authority from the minister charged with the administration of the *Hydro and Power Authority Act*;

"heritage contract" means the document attached as Appendix A to this Special Direction;

"heritage deferral account" means an account established under section 7 (a) of this Special Direction;

"heritage energy" has the same meaning as in the heritage contract;

"heritage payment obligation" has the same meaning as in the heritage contract;

"heritage resources" has the same meaning as in the heritage contract;

"trade income" means the audited net income of Powerex Corp., according to generally accepted accounting principles, adjusted by,

(a) if the audited net income is less than zero, adding the amount necessary to make it zero, and

(b) where audited net income is greater than $200 million, subtracting any amounts in excess of $200 million;

"transmission rate customers" means industrial or commercial customers of the authority who are eligible for service under rates designed by the commission under section 3.

Application

2 This Special Direction is issued to the commission under sections 3 and 4 of the Act.

Consideration in designing rates for transmission rate customers

3 (1) In designing rates for the authority's transmission rate customers, the commission must ensure that those rates are consistent with recommendations #8 to #15 inclusive in the commission's report and recommendations to the Lieutenant Governor in Council dated October 17, 2003.

(2) Without limiting subsection (1), the commission must ensure the following:

(a) the rates for the authority's transmission rate customers are subject to

(i) the terms and conditions found in Supplements 5 and 6 to the authority's tariff, and

(ii) any other terms and conditions the commission considers appropriate for those rates;

(b) customers who own multiple plants under common ownership may engage in load aggregation for energy, if each plant

(i) is in operation, and

(ii) meets the requirements to be a transmission rate customer that are set out in the authority's tariff, or is otherwise authorized by the commission to be treated as a transmission rate customer;

(c) the authority publishes the Tier 2 rate in the manner and with the frequency required by the commission.

Basis for establishing authority revenue requirements

4 Subject to section 7, in regulating and setting rates for the authority, the commission must ensure that those rates allow the authority to collect sufficient revenue in each fiscal year to enable the authority to

(a) provide reliable electricity service,

(b) meet all of its debt service, tax and other financial obligations,

(c) comply with government policy directives, including, without limitation, government policy directives requiring the authority to construct, operate or extend a plant or system, and

(d) achieve an annual rate of return on equity equal to the pre-income tax annual rate of return allowed by the commission to the most comparable investor-owned energy utility regulated under the *Utilities Commission Act*.

Determining the cost of energy

5 In setting the authority's rates, the commission

(a) must treat the heritage contract as if it were a legally binding agreement between 2 arms-length parties,

(b) must determine the energy required by the authority to meet its domestic service obligations and must determine the cost to the authority of the portion of that required energy that is in excess of the energy supplied under the heritage contract,

(c) may employ any mechanism, formula or method referred to in section 60 (1) (b.1) of the *Utilities Commission Act*, and

(d) unless a different mechanism, formula or method is employed under paragraph (c), must ensure that electricity used by the authority to meet its domestic service obligations is provided to customers on a cost-of-service basis.

Return on equity

6 In setting the authority's rates, the commission must allow the authority an annual rate of return on equity calculated using forecast consolidated operating income, which forecast consolidated operating income is calculated on the basis of forecast trade income.

Deferral accounts

7 When regulating and setting rates for the authority, the commission:

(a) must allow the authority to establish one or more accounts to reflect and record variances between

(i) the heritage payment obligation and the authority's forecast of the heritage payment obligation, and

(ii) the trade income and the authority's forecast of trade income,

(b) may allow the authority to establish one or more other deferral accounts for other purposes, and

(c) must set or regulate the authority's rates in such a way as to allow the deferral accounts to be cleared from time to time and within a reasonable period of time.

Annual distributable surpluses allowed

8 When regulating and setting rates for the authority, the commission must ensure that those rates allow the authority to allocate annual distributable surpluses in the manner specified by the Lieutenant Governor in Council under section 4 of the Act or section 35 of the *Hydro and Power Authority Act*.

Appendix A to Heritage Special Direction No. HC2

Heritage Contract

WHEREAS on November 25, 2002, the Province of British Columbia released Energy for Our Future, A Plan for B.C. (the "Energy Plan");

AND WHEREAS the Energy Plan outlines certain policy actions designed to ensure British Columbians have continued access to sufficient supplies of dependable low-cost electricity;

AND WHEREAS the Energy Plan provides in Policy Action #1 that a legislated heritage contract will be created between BC Hydro's generation line-of-business and BC Hydro's distribution line-of-business for an initial term of 10 years.

THEREFORE, BCH Distribution and BCH Generation (the "parties") agree as follows.

Definitions

1 In this Agreement:

"Act" means the *BC Hydro Public Power Legacy and Heritage Contract Act*;

"Agreement" means this Heritage Contract including Schedule A;

"Ancillary Service Requirements" means services necessary to deliver energy;

"BC Hydro" means the British Columbia Hydro and Power Authority;

"BCH Distribution" means BC Hydro's distribution line-of-business;

"BCH Generation" means BC Hydro's generation line-of-business;

"Commission" means the British Columbia Utilities Commission;

"heritage electricity" means the capacity, energy and ancillary services that BCH Generation is required to supply to BCH Distribution under this Agreement;

"heritage energy" means

(a) subject to paragraph (b), 49 000 GW.h per year less the energy generated for delivery under the Skagit Valley Treaty, or

(b) the quantity of energy determined by the Commission under section 8 of this Agreement to be heritage energy;

"heritage payment obligation" means

(a) subject to paragraph (b), the annual payment determined in accordance with the procedure set out in Schedule A to this Agreement, or

(b) the annual payment determined by the Commission under section 8 of this Agreement to be the heritage payment obligation;

"heritage resources" means the Electric Facilities and Thermal Facilities described in Schedule A to the Terms of Reference, together with

(a) the related civil works and plant, and

(b) potential future investments that increase the capacity, energy or ancillary service capability of such facilities, including potential future units 5 and 6 at Mica and potential future units 5 and 6 at Revelstoke;

"Order" means an order of the Commission;

"Terms of Reference" means Schedule A, Terms of Reference, to Order-in-Council No. 0253/2003;

"Transfer Pricing Agreement" means the Transfer Pricing Agreement for Electricity and Gas dated April 1, 2003 between BC Hydro and Powerex Corp. as amended from time to time;

"Year" means fiscal year.

Electricity Supply

2 BCH Generation must provide the full capacity of the heritage resources to BCH Distribution on a priority call basis.

Obligation to supply

3 BCH Generation must supply to BCH Distribution, in each Year, the heritage energy or such lesser amount of energy as may be required by BCH Distribution.

Obligation to deliver

4 BCH Generation will deliver the heritage energy to BCH Distribution at the various points of interconnection of the generating stations included in the heritage resources with the BC Hydro transmission grid or at points of interconnection with other utilities, as appropriate.

Responsibility for obtaining transmission services

5 BCH Distribution will be responsible for obtaining transmission services for energy provided to BCH Distribution.

Ancillary services

6 The parties may use the capacity available to them under section 2 to deliver energy to meet customer demand and to satisfy the parties' Ancillary Service Requirements, regardless of whether provision for self-supply is made under any tariff.

Payment

7 BCH Distribution must, on or before the end of each Year, pay to BCH Generation an amount equal to the heritage payment obligation.

Adjustment

8 The parties acknowledge that

(a) the Commission may, by Order, modify one or both of the definitions of "heritage energy" and "heritage payment obligation" if the commission is satisfied that a change in circumstances has permanently affected

(i) the capability of the heritage resources to provide one or both of capacity and energy, or

(ii) the authority's cost of generating the heritage energy, and

(b) any such modification will automatically modify the heritage energy or the heritage payment obligation, as the case may be, without further action by the parties.

Information exchange and cooperation

9 Each party will continue to freely provide the other with any requested information to facilitate the coordinated and optimal operation of the BC Hydro system.

Dispute resolution

10 (1) The parties will make reasonable efforts to resolve disputes arising in relation to this Agreement at the staff level.

(2) As needed, issues may be dealt with by management levels within each party to achieve timely resolution.

(3) Issues that cannot be resolved in a timely manner at senior management levels, may be referred by either party to the commission for resolution.

Term and termination

11 (1) This Agreement shall commence on April 1, 2004.

(2) This Agreement may be terminated by government, with 5 years notice, any time after April 1, 2009 and if such notice is given, the Agreement shall terminate at the

end of the 5-year notice period without any further action by the parties or the government.

Dated as of this ..... day of ....., 2004.

.....

BCH Distribution

.....

BCH Generation

Schedule A

Heritage Payment Obligation

The heritage payment obligation for any Year is the amount determined by

(a) adding those of the following costs incurred by BCH Generation in the Year that the Commission orders may be included in the heritage payment obligation:

(i) cost of energy such as the cost of water rentals and energy purchases, including purchases of gas and electricity, required to supply heritage electricity;

(ii) operating costs such as the costs of operating and maintaining the heritage resources, including an allocation of corporate costs;

(iii) all costs of owning the heritage resources, including, without limitation, depreciation, interest, finance charges and other asset related expenses;

(iv) all costs or payments related to generation-related transmission access required by the heritage resources;

(v) the applicable return on equity on investments in heritage resources based on Heritage Special Direction No. HC2 to the Commission under the authority of the Act, and

(b) by subtracting from the sum obtained under paragraph (a), any revenues BCH Generation receives from other services provided from the heritage resources, including, without limitation,

(i) revenues related to Skagit Valley Treaty obligations,

(ii) revenues from provision of ancillary services to the transmission operator in respect of third party use of the transmission system, and

(iii) revenues from the sale of surplus hydro electricity under section 5 of the Transfer Pricing Agreement.

Heritage Special Directive No. HC1 to the British Columbia Hydro and Power Authority, Order in Council No. 1125 (Nov. 27, 2003), provides:

PROVINCE OF BRITISH COLUMBIA

ORDER OF THE LIEUTENANT GOVERNOR IN COUNCIL

Order in Council No. 1125 Approved and Ordered Nov. 27, 2003

/s/ [Illegible]
Lieutenant Governor

Executive Council Chambers, Victoria

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that, effective July 1, 2004,

(a) Special Directive No. 4, dated March 30, 2000 and made under section 35 of the *Hydro and Power Authority Act*, is repealed, and

(b) the attached Special Directive No. HC1 is made.

/s/ [Illegible]
Minister of Energy and Mines

/s/ [Illegible]
Presiding Member of the Executive Council

HERITAGE SPECIAL DIRECTIVE NO. HC1 TO THE BRITISH COLUMBIA UTILITIES COMMISSION

Definitions

1 In this Special Directive:

"Act" means the *Hydro and Power Authority Act*,

"debt" means, in relation to a fiscal year of the authority, the amount obtained by

(a) adding the outstanding amounts of the following at the end of the fiscal year:

(i) borrowings;

(ii) bonds;

(iii) notes;

(iv) debentures, and

(b) deducting from the amount determined under paragraph (a) the sum of the of the following amounts at the end of the fiscal year:

(i) sinking funds;

(ii) temporary investments;

(iii) repurchased debt;

"distributable surplus" means, for a fiscal year,

(a) the consolidated net income, earned by the authority and its subsidiaries from all sources, as reflected in the authority's audited consolidated financial statements for that fiscal year, less

(b) the finance charges capitalized during the fiscal year, net of depreciation charged on capitalized finance charges;

"equity" means the sum of the following amounts at the end of the fiscal year:

(a) retained earnings;

(b) deferred revenue;

(c) contributions arising from the Columbia River Treaty;

(d) contributions in aid of construction.

Application

2 This Special Directive is issued to the authority under section 35 of the Act.

Annual payment

3 On or before June 30 of each year after 2004, the directors of the authority must cause the authority to pay to the government, for deposit into the consolidated revenue fund, an amount equal to

(a) 85% of the authority's distributable surplus for the previous fiscal year of the authority, or

(b) if the payment required under this section would result in the debt/equity ratio of the authority exceeding 80:20, the greatest amount that can be paid by the authority without causing the authority's debt/equity ratio, after the payment is made, to exceed 80:20.